CHARLES E. HUGHES

THE STATESMAN AS SHOWN IN THE OPINIONS OF THE JURIST

WILLIAM L. RANSOM

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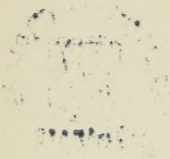

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BY

WILLIAM L. RANSOM

JUSTICE OF THE CITY COURT
OF THE CITY OF NEW YORK

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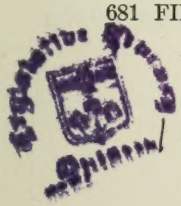

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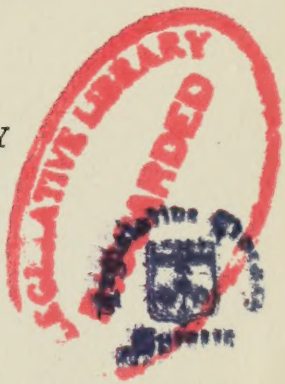

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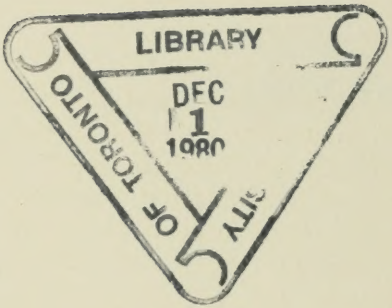
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PREFACE

In bringing together for publication, several years ago, "The Constitutional Decisions of John Marshall," the scholarly editor[1] made reference to the fact that "save Washington, Hamilton and Lincoln, no American stands higher (than Marshall) as a constructive statesman in the work of the evolution of the Union," and he added that "it is the peculiarity of his work of statesmanship that—practically without exception—all of it found expression in the course of judicial opinions as Chief Justice."

That great services of constructive National statesmanship should thus have been rendered in a judicial position and given expression through judicial opinions, was not a casual circumstance due alone to the ability of Marshall and his contemporaries in the Supreme Court. The creation of the Federal judiciary as a separate department of government, and the delegation to it of powers and duties transcending the arbitrament of controversies of private right, made the Supreme Court of the United States all that Washington called it—"the key-

[1] "The Constitutional Decisions of John Marshall," edited, with an Introductory Essay, by Joseph P. Cotton, Jr., of the New York Bar. (1905.)

stone of our political fabric." DeTocqueville found, eighty-one years ago, on his visit to America, that the Supreme Court had been "placed at the head of all known tribunals," and James Bryce later observed that "The Supreme Court is the living voice of the Constitution—of the will of the people expressed in the fundamental law." Entrusted with the duty of determining co-ordinately, but finally so far as the departments of government are concerned, all questions of the meaning and requirements of the Constitution and Federal laws; entrusted with the function, in behalf of the Nation, of passing authoritatively upon those questions of adjustment and relationship which give vitality to the National power and solidarity to the Union of States, the Supreme Court has continued to be generally the most expert factor in American statesmanship and the most accurate expositor of the ultimate public opinion. Especially as to questions of Constitutional interpretation, the trained judgment, detached from local controversies too commonly called politics, has carried an authority which needed no finality of power to give it sanction; casual Presidents and changing Congresses have been in no position to speak so accurately or authoritatively of fundamental questions of the National structure and the National power. The result has been that, through the years, the Supreme Court has embodied, more than either the executive or the legislative departments of

government, those factors of accommodation and adjustment which, under Constitutional forms, have welded a workable National polity from a Confederation of hesitant and mutually distrustful States. Our framework of government and the powers committed to the judiciary under it have made the Supreme Court the exponent of the expanding Nationalism of each succeeding generation, and the statesmanship of the members of that revered tribunal has been at least no less influential than that of the leaders in legislative councils and administrative responsibility.

The impressive position of the Supreme Court as an expert factor in the formulation of a National outlook upon matters of fundamental political philosophy and procedure, and its usefulness as a continuing agency of adjustment between the departments of government and between State and Federal authority, have been commented upon by accurate observers of the American form of government. For example, in the opening paragraph of his "Constitutional Law of the United States," Dr. von Holst pointed out the reasons why, under the American system, the viewpoint of the jurist becomes an indispensable factor in the activities of the statesman, and why likewise the Federal jurist must apply, to his interpretation of the charter of government and the amplification of its expanding powers, the point of view of the constructive statesman. "Like every constitution

which has, or can have, a real life," said he, "that of the United States of America is a result of actual circumstances of the past, and not a product of abstract political theorising. . . . Since the life of the people is the basis of the Constitution and undergoes a steady development, the Constitution itself, quite apart from any formal alterations, must have a certain capacity for change, and this not the less real because there is no formal statement of it in the instrument itself. A Constitution which resembles a Chinese shoe can suit only a nation which has sunk into Chinese inertia. . . . *If the statesman is bound to be, in the practical discharge of his duties, a conscientious jurist, the jurist must, in his work of examination and testing, always keep in mind the point of view of the statesman.*" In passing judgment, therefore, upon any matter of the qualifications or the public services of a member of the Supreme Court, there is necessarily kept in mind, not alone his skilled judgment in the decision of controversies between man and man, but also his outlook and vision upon National life and National powers; and in forming estimate of the statesman charged with legislative or executive leadership, account must be taken of his views of constitutional power and National dominance, even though finality of interpretation as to those matters is committed to the judicial branch of government. The statesmanship of the judicial officer and the judicial in-

sight of President and legislator are each an essential part of the effective inter-adjustments of our Federal system, and many of the most sound expressions of National thought and most valuable guide-posts of National policy are to be found in the reported decisions of the Nation's great Court.

In selecting men to discharge the duties of administrative or legislative positions in the Federal sphere, there is often failure to take into account their opinions upon basic questions of governmental purpose and National power. These are looked upon as "constitutional questions"; they are thought of as committed to the determination of the Courts alone. In point of fact, however, the judiciary has only a power of review and limitation, after the legislative and executive branches have acted upon their own opinions as to the powers defined and duties imposed by the organic law. President and Congress, no less than the courts, have taken oath to support and fulfil the Constitution; its provisions are no less binding upon them than upon the Supreme Court; the constitutional opinions of the President and a majority of Congress ordinarily blend with their views of desirable policy in shaping the course of political action; and as to the overwhelming majority of the matters dealt with by the Federal government, the determinations of the executive and legislative departments are final upon questions of governmental power, duty and purpose,

and judicial review is not called into action.

The views held by a President or Senator, for example, on questions of State and National power under the Constitution, and on the permissible scope of social-welfare legislation under the "police power," may be no less decisive in their effect upon the policies of the government than as though those views were held and declared as a member of the Supreme Court. If the Executive endeavours to go beyond the boundaries of National power as defined by the Constitution, or if he endeavours to put in force legislative measures at variance with the fundamental spirit of our laws, the Supreme Court is vested with power to check and curb, and its determinations are final on the question whether Executive proposals are in excess of constitutional powers. Beyond the boundaries as defined by the Supreme Court, the Executive and Congress cannot go, without recourse to the people as the repositories of the ultimate power, through orderly amendment. But if a timid Executive or halting Congress hold views of National powers, duties, rights, and conceptions of the proper boundaries of regulative control in the public interest, which fall, it may be, far short of the National concepts declared by the Supreme Court, then the Constitutional concepts of the President and Congress become controlling and mark the limits of governmental policy within that Administration.

To make the matter still more concrete: If a

President of the United States does not believe that a nation-wide child-labor law is within the scope of powers committed by the Constitution to the National government, his view of the Constitution prevents the enactment of such a law, unless a two-thirds vote of Congress overrides him or he changes his mind. Every member of the Supreme Court may believe that under the "commerce clause" of the Constitution and in the exercise of the broad power of the National government to act effectively for the "public welfare" in connection with essentially National concerns, a Federal child-labour law would be within the power of Congress to enact and of the President to sign and put in force; but as long as the President believes that the safeguarding of the health and robustness of children in industry has been left by the Constitution in the hands of the States, his veto gives finality to his view of the Constitution and the National power, unless a sufficient preponderance of the members of each House of Congress votes to overcome his adverse view. If the President and Congress hold a narrower view than does the Supreme Court as to the boundaries of National power and action, that is within their discretion, and they are accountable only to voters who may not have taken those important factors into account in electing them to administrative or legislative responsibility. A "strict-construction," "States-rights" President may give effectiveness to a

cramped and devitalised view of the Nation under the Constitution, and may give finality to such a view in the face of a contrary outlook on the part of the highest judicial authority in the land. On the contrary, a statesman who, as von Holst phrased it, is "in the practical discharge of his duties, a conscientious jurist," with a broad, sound concept of the adaptability of the "unchanging provisions" of the Federal Constitution "to the infinite variety of the changing conditions of our National life," is in superb position to make effective the important constructive reforms which he undertakes.

These factors which I have indicated give reason for especial popular interest at this time in the opinions rendered by Charles Evans Hughes during the period of his service in the Supreme Court of the United States. From October of 1910 to June of 1916, he was a member of that tribunal, and dealt day by day with the epoch-making issues of National power and policy brought into its chamber. During those eventful years, the Supreme Court was fulfilling more than its usual part of "constructive statesmanship in the work of the evolution of the Union," and it is true of Mr. Hughes during those years, as it was true of John Marshall throughout his period of great service to the Nation, that "practically without exception" "all of his work of statesmanship" "found expression in the course of judicial opinions."

During nearly six years, practically the sole record of the views of Mr. Hughes upon National problems and his point of approach to their solution—the record of his constructive statesmanship during five important years—is of necessity to be found in the reported decisions of the Supreme Court of the United States. When it is proposed by some to transfer Mr. Hughes from National service in a judicial position to the supreme executive position of the land, in which his views on constitutional questions would by his oath be no less binding upon him than heretofore, it would seem to be of importance that the public should have means of becoming familiar with those views and with his outlook upon public questions and with the way in which his mind and heart work when he is brought to face vital issues of National policy. From the bound volumes of these reports of the decisions of the Supreme Court should be brought to the people of the United States adequate and accurate information as to the views and vision of Mr. Hughes upon governmental problems, as disclosed by his unremitting daily work in that Court. That is the purpose of this volume.

Of course, no opinion written or decision participated in by Mr. Hughes as a member of the Supreme Court should now be looked upon by any one as reason for the giving or withholding of support in the political arena. The outcome of a judicial proceeding cannot with propriety

be regarded as reason for the political reward or punishment of a judicial officer open-mindedly participating therein in the course of duty. The work of an independent judiciary has been, and will continue to be, kept free from the possible operation of ulterior influence of that kind. At the same time, for reasons which have, I trust, been sufficiently indicated, the judicial utterances of Mr. Hughes are a legitimate subject of analysis and consideration at this juncture, in so far as they disclose the workings of his mind, his outlook upon National problems, and his manner of reasoning as to problems which come before the Chief Executive before they are possibly brought before the Supreme Court. His judicial opinions upon Constitutional questions compose, thus far, his chief contribution to National statesmanship—a very notable contribution, indeed —and the electorate will find no reason now for excluding Mr. Hughes' memorable opinions from its own available sources of information as to the manner of man he is and the kind of a President he would be likely to be.

The chapters which follow in this volume do not undertake to establish or disprove the qualifications of Mr. Hughes for the Presidency of the United States, much less to argue for or against his election. The purpose is to present information—to make more generally available a quantity of information which otherwise could be found only through delving through

many volumes of usually dusty law-books—and to present this information in such form as to make it understandable by a reader without legal training. To this end, all of the opinions prepared by Justice Hughes have been brought together and summarised within a single volume, and those which deal with questions of National power and policy, as distinguished from the adjudication of controversies based upon private law, have been quoted from at length. An effort has also been made to accompany each such quotation with a fair statement of relevant facts, helpful in grasping the public bearings of the views uttered, and then to let the opinions themselves tell their own story and guide the reader to his own impressions of the man who wrote them. I believe that each reader will form a very definite impression of Mr. Hughes from a careful reading of his judicial opinions, as quoted in the present volume. You may or may not like the manner of man disclosed; you may or may not feel that he should be chosen for the supreme executive office of the land—this volume is in fact concerned with none of these queries. Its purpose will be fulfilled if the lay reader finds fairly presented herein the information on which he can base a better estimate of Mr. Hughes.

The title of the book indicates that it deals with a man, his service in the Supreme Court, and the opinions which he rendered as a member of that revered tribunal. That is at least

the pretext, if not altogether the theme. In a broader sense, the volume is a record of an institution during nearly six important years of its history, and I shall be disappointed if any reader gains from these pages only an estimate of one of the members of that Court, and fails to gather an impression of the Court itself, as a great, unified working force for the development of National institutions and the conserving to the communities of those concerns with which they can most effectively deal. If there is much in the judicial utterances of Justice Hughes which reflects accurately the best thought and policy of the Republic as embodied in its organic law, it is because the Supreme Court itself performs accurately and acceptably that function of interpretation and does its full part in making republican institutions the available instruments of justice under law.

This volume has of course been prepared without the knowledge of Mr. Hughes or those charged with the conduct of his campaign. Conceivably they would not wish for its publication. It has of necessity been made ready in the scant leisure permitted by daily tasks which demanded first consideration, and I am indebted to Charles G. Keutgen, of the New York Bar, for aid in the scrutiny of manuscript and proofs.

William L. Ransom.

New York City, July 20, 1916.

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CHARLES E. HUGHES

THE STATESMAN AS SHOWN IN THE OPINIONS OF THE JURIST

CHAPTER I

INTRODUCTION

Charles Evans Hughes was appointed to the Supreme Court by President Taft on April 25, 1910. He was then nearing the close of his second term as Governor of New York, having been first elected in 1906. Before becoming Governor, he had been a practising lawyer in New York City since 1884, with the exception of the years 1891 to 1893, when he was a professor in the Cornell University College of Law at Ithaca. His professional eminence had received public recognition through his service in 1905 and 1906 as counsel to the special investigating bodies of the New York Legislature, known as the Stevens Gas and Electric Lighting Committee and the Armstrong Life Insurance Investigation Committee. In 1906 he had been designated as one of the special counsel of the United States Department of Justice to initiate steps for the prosecution of the so-called coal-owning and coal-carrying railroads for violations of the Anti-Trust and Anti-Rebate laws. As Governor of New York, he had taken a large part in the draughtsmanship, as well as advocacy, of constructive statutes, such

as those creating the New York Public Service Commissions and those formulating more adequate standards for the conduct of the affairs of life insurance companies. He had also been responsible for the creation and personnel of the so-called Wainwright Commission, whose monumental inquiry into the social aspects of occupational injury and disease was the starting-point of the "social-justice" campaign in many States. Governor Hughes worked in the closest co-operation with the Wainwright Commission throughout its exhaustive labours, and gave executive approval to the Workmen's Compensation Act of 1910, recommended by the Commission as a frankly experimental beginning of progress in that domain of awakened social conscience.

The Senate of the United States, on May 2, 1910, confirmed the appointment of Mr. Hughes, but the October Term of 1909 was then nearing its close and Mr. Hughes was in the midst of important tasks as Governor of New York. With the approval of the President, he did not resign as Governor or take his seat as a member of the Supreme Court, until October 10th. The vacancy thus filled was that created by the death of Justice David J. Brewer of Kansas, who had died on March 28, 1910. An interesting commentary upon the change which a century has brought in the prestige and rank of the Supreme Court is afforded by the fact that

its first Chief Justice resigned to become Governor of New York, after having served as Minister to England for a year without withdrawal from his judicial office, and that Oliver Ellsworth, whom President Washington subsequently appointed as Chief Justice, spent two years abroad as Commissioner to France, likewise without resigning the Chief Justiceship. As Willoughby says,[1] "a position on its bench was then considered not as important as many positions now ranking far below it. Such position was not even considered incompatible with the holding of another office at the same time." The founders of the republic felt that, in common with any other citizen, a member of the Supreme Court might be called to any other post of public service as the public need arose, with or without retirement from his judicial place, as the circumstances seemed to warrant. This view gave no sanction, however, to manifest political bias on the part of a member of the Nation's highest Court, as was shown by the failure of the Senate to confirm Washington's appointment of Rutledge of North Carolina as successor of John Jay in the Chief Justiceship. After Rutledge had received information of his appointment, he delivered a speech which disclosed an intense partisanship, and this was forthwith recognised as disquali-

[1] "The Supreme Court of the U. S.," by Westel W. Willoughby. (Johns Hopkins University Studies: 1890.)

fying him for the place for which he had been named.

At the time Mr. Hughes was translated from executive to judicial responsibility, he was 48 years of age, and thus by nine years the youngest member of the Court. Chief Justice Fuller of Illinois had died on July 4, 1910, and Justice John Maynard Harlan of Kentucky presided over the Court from the opening of the October Term until December 19th, when Justice Edward Douglass White of Louisiana took the oath as Chief Justice, by appointment of President Taft. At the time Mr. Hughes entered upon his duties, the Court was made up of Associate Justices Harlan, White, Joseph McKenna of California, Oliver Wendell Holmes of Massachusetts, William R. Day of Ohio, William Henry Moody of Massachusetts, Horace Harmon Lurton of Tennessee. Justice Moody, however, had suffered for some months from a disabling illness, and on November 20th accepted retirement under a special Act of Congress. The virtual re-constituting of the personnel of the Court during the year 1910 was completed by the appointment, on December 12th, of Justice White to be Chief Justice, of Joseph Rucker Lamar of Georgia as successor of Justice Moody, and Willis Van Devanter of Wyoming as successor of Mr. White as Associate Justice. The Court thus had again its full quota of members, and was composed of Chief Justice White and Associate Justices Harlan,

McKenna, Holmes, Day, Lurton, Hughes, Van Devanter, and Lamar. This rugged and well-balanced working organisation was unbroken until the death of Justice Harlan, on October 14, 1911. On March 18, 1912, Mahlon Pitney, Chancellor of New Jersey, took his seat as Justice Harlan's successor. On July 12, 1914, Justice Lurton died during vacation, and at the opening of the October Term of that year, Attorney-General James Clark McReynolds became a member of the Court, by appointment of President Wilson. On January 2, 1916, Justice Lamar died. Louis Dembitz Brandeis of Boston took seat as his successor, immediately before Justice Hughes tendered his resignation on the tenth of June.

The first reported opinion written by Justice Hughes was that in the case of *Kerfoot* against the *Farmers' and Merchants' Bank,* reported in the 218th volume of the United States Reports, at page 281. This case was argued before the Court on October 25, 1910, fifteen days after he went on the bench; the opinion prepared by Justice Hughes was handed down on November 7th, less than two weeks later. His first reported dissent came in the case of *Thompson* against *Thompson,*[1] on December 12th of that year. In this case Justices Harlan, Holmes and Hughes found themselves unable to accept the majority opinion that a wife could not main-

[1] 218 U. S. Reports, page 611.

tain an action in the District of Columbia against her husband, for damages for an assault and battery committed against her person, and Justices Holmes and Hughes concurred in Justice Harlan's trenchant assertion of a contrary opinion. The first dissenting opinion written by Justice Hughes was in the case of *United States* against *Johnson*,[2] on May 29, 1911. In this dissent, concurred in by Justices Harlan and Day, Justice Hughes contended that the "mis-branding" provisions of the Food & Drugs Act of 1906 applied to false statements of facts as to the curative qualities of articles sold as drugs and medicines, and that "mis-branding" did not relate merely to false statements of the identity of the article, for example, its strength, quality, purity, and the like. The majority of the Court felt otherwise, but at the beginning of 1916 Justice Hughes was able to write for a unanimous Court an opinion upholding the constitutionality of the Sherley Amendment of 1912 to the Food & Drugs Act, by which amendment Congress had given prompt legislative sanction to the view expressed by the minority in the *Johnson* case and had unmistakably declared that the penalties against mis-branding should be deemed applicable to any "false and fraudulent" statements on the package or label "regarding the curative or therapeutic effect of such article" sold.

The last opinion written by Justice Hughes

[2] 221 U. S. Reports, page 488.

as a member of the Supreme Court was handed down on June 12, 1916, the Monday following his resignation. This opinion [1] dealt with the paramountcy of New York State fish and game regulations over the fishing rights of Western New York Indians on tribal lands alienated by them with attempted reservation of hunting and fishing rights. It had been prepared by Justice Hughes and approved by his colleagues before his resignation. "After that event," so states the note which precedes the opinion as reported in volume 241 of the United States Reports, "it was again considered, re-adopted, and delivered by White, Ch. J."

From the first, he had made clear his belief and desire that his judicial work was his life work, worthy of the utmost energy and ability at his command, and in a number of unmistakable ways he had made known his desire that friends and opponents alike should cease to think of him in any political connection. He wished to remain upon the Supreme Court; he believed that he ought to be permitted to remain there; and at no time did he deviate in any discernible degree from that wish and that belief. His concise, matter-of-fact opinions, free from any trace of utterance which could be regarded as written for the public ear or for any purpose foreign to the necessities of the controversy at bar, tend to refute any suggestion

[1] *New York* vs. *Becker* (241 U. S. Reports ——.

that at any time from October of 1910 to June of 1916 was there a willingness on his part to be counted a factor in future political calculations. On repeated occasions, he made known his insistent opposition to the use of his name in connection with the presidential nomination which he had deliberately placed aside in accepting the appointment tendered by President Taft. With one of his predecessors,[1] appointed to the Supreme Court by President Lincoln, Justice Hughes believed, however, that "the Chief Magistracy of the Republic should neither be sought nor declined by any American citizen," especially at such a time of National difficulty as was presented in June of 1916; he felt that the citizenship of the Nation had the right to summon to the Presidency any man in the land, and that no man had the right to place his own preference for a present post of service above the right of the people to requisition for the Presidency the best ability at their command. He made known his own preference for remaining in the Supreme Court, his view that it was for him the highest post of service to the Nation, and his belief that nothing should be done to interrupt his work in that tribunal; but when the time and the summons came, he said, with perfect truthfulness:

[1] Justice David Davis of Illinois, nominated by the Labor Reform Party in 1872. In 1877, Justice Davis resigned from the Supreme Court to accept election to the U. S. Senate from Illinois.

I have not desired the nomination. I have wished to remain on the bench. But in this critical period in our National history, I recognise that it is your right to summon and that it is my paramount duty to respond. . . . I should have been glad to have had that responsibility placed upon another. . . . I have resigned my judicial office. . . . I accept the nomination.

On June 10, 1916, his resignation terminated the judicial service begun on October 10, 1910.

During this period of approximately five years and eight months' service in the Supreme Court, and within the twenty-four volumes of official reports numbered from two hundred and eighteen to two hundred and forty-one, Justice Hughes prepared 150 opinions which were rendered as the opinions of the Court, and in only nine instances was there dissent from his opinion as prepared. In but three instances did more than one Justice dissent.

He could not with accuracy be called a "dissenting judge." Throughout his judicial career, there was no trace of that showy isolation of individual opinion, whose reverberating sentences have sometimes shaken public confidence in the certainty of legal principles. On only thirty occasions did he find himself aligned with a minority of the Court, and in only six of those instances did he write the dissenting opinion. In fourteen of the thirty occasions, he concurred in dissenting opinions

prepared by men long his seniors in the Court; and in six instances he joined with colleagues in dissenting without filing memoranda of reasons. When he did dissent, it was usually with large minorities and on close divisions; in about two instances throughout his service on the bench was he alone in declaration of variance from the majority view.

In the appendices of this volume will be found a complete *résumé* [1] of all the opinions which he wrote in behalf of the Court during his period of service on the bench, and also an equally interesting table [2] of summary of the controversies as to which he found himself aligned with a minority of the Court.

He was in fact, if all indications of the man and his work may be accepted as indicating a conclusion, what may be termed a "team-work judge." He worked in close co-operation and fellowship with his associates, in that task which he often referred to as "in a democracy . . . the highest privilege of vocation." To him were assigned many of the cases requiring an unusual amount of physical as well as intellectual labour of the most exacting sort, and he brought to that work an incisive and analytical mind, a conscience sensitive to fundamental right, and what Mr. Cotton has called "so sound a common sense for the working of legal theory, so just an instinct for the National

[1] See page 282, *post.* [2] See page 328, *post.*

welfare, and so austere and unswerving a judicial fairness and openness of mind."

He displayed a broad and sympathetic knowledge of human affairs, and that knowledge was his guidance, rather than any preconceptions of social, economic or political theory. Notably along lines which will be set out in later chapters of this volume, he made a substantial and valuable contribution to the orderly development of American law, and he did it by working incessantly to make judicial processes effective in the application of fundamental concepts to new conditions. His opinions were clear and rugged; they teem with facts, details, corroboration gained from authoritative sources far outside the law books; they are deficient in any display of vain learning and mere erudition for its own sake, which might make them more attractive to a lay reader but less compact in dealing with the essential issues.

With hardly an exception, his opinions reveal a man who is looking at actualities and is facing forward. His judicial statesmanship as revealed by his opinions meets fully Burke's definition:

> A disposition to preserve, and an ability to improve taken together, would be my standard of a statesman.

And he also realised with Burke that "a state without means of change is without the means

of its own conservation." The free play of his compact and incisive reasoning touched many topics—copyright law, the patient examination of the tribal records on which rest titles of the lands of Indian wards, bankruptcy and commercial law, the simplification of procedure, taxation, the franchises and rates of public service corporations, and many others—but his great and memorable service was in re-definition and application of the boundaries of State and National authority, and in welding together anew the economic and political elements of a dominant Nationalism.

It could with propriety be said of him, as it was said of John Marshall by Mr. Bryce, that

> He grasped with extraordinary force and clearness the cardinal idea that the creation of a National government implies the grant of all such subsidiary powers as are requisite to the effectuation of its main powers and purposes, but he developed and applied this idea with so much prudence and sobriety, never treading on purely political ground, never indulging in the temptation to theorise, but content to follow out as a lawyer the consequences of legal principles, that the Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him until it stood revealed in the harmonious perfection of the form which its framers had designed.

Justice Hughes vindicated afresh the adequacy and practicability of the Constitutional

concepts of the boundaries of State and National action; he established in concrete fashion the effectiveness of the historic concepts of control; he answered acceptably a challenge which the complexity of new transportation and industrial problems seemed for a time to make to the Federal system.

He *was* "a team-work judge," not an unreasoning adherent of individual opinion. Perhaps the best thing that can be said about his work, under all the conditions of the National life of the past five years, is that it does not, and was not made to, stand out in any way from the trend of policy and decision of the Court as a whole. This record of his opinions and utterances is almost equally a record of the opinions and utterances of the Court as a whole. If he was progressive and forward-looking, so were his colleagues. The great issues brought before the Court were threshed out in its conferences, and thereby was developed a patriotic unity and agreement of view which has fortified both the Court and the Constitution in public confidence. There may be understanding of what Justice Hughes meant, in saying before the New York County Lawyers' Association in 1911, that

In the conferences of the Justices of the Supreme Court of the United States, there is exhibited a candour, a comprehensiveness, a sincerity, and a complete devotion to their task, that I am sure would be most gratifying to the

entire people of the Union, could they know more intimately what actually takes place.

And we may understand what former Justice John Archibald Campbell meant in saying, in the course of that intimate description of the work and conferences of the Court which is to be found in his remarks at the exercises in commemoration of Justice Benjamin R. Curtis in 1874, as reported in the twentieth volume of Wallace's Reports, that of all the enumerated duties performed by a Justice of the Supreme Court, "the most arduous and responsible duty is in the conference."

In a tale adapted from the Talmud, there is a comparison which may be used to characterise the manner and spirit of approach to public questions which seems to stand out through the judicial service of Charles E. Hughes. Mastery of law and its development and application are there likened to a great heap of dirt that needs to be cleared away:

The foolish man says: "It is impossible that I should be able to remove this immense heap. I will not attempt anything so impossible. I will ignore it, and pass it by, and say there is no such obstacle." But the wise man says: "I see it. It is there. It has to be dealt with. I will remove a little to-day, some more to-morrow, and more the day after, and thus in time I shall have removed it all; and the fathers will be glad."

CHAPTER II

NATIONAL POWER OVER NATIONAL INTERESTS

The monumental and distinctive service rendered by Mr. Hughes in the Supreme Court was in the so-called "State Rate Cases"—an epochal series of controversies which came up from the commonwealths of the Mississippi Valley and South-west and subjected our dual system of State and National sovereignty to the most severe strain and test since the Civil War. To him there was entrusted, not only the prodigious labours of the perusal of an unprecedented quantity of printed records and exhaustive briefs, incident to the examination of the intricate questions of valuation, rates, returns, fixed charges, depreciation, repairs, intangible and physical property, franchises, and the like, on which largely depended the determination of the reasonableness or confiscatory character of hundreds of orders of State Commissions affecting thousands of rates over diverse areas, but also the preparation of opinions which necessarily undertook the task of making concrete, understandable, workable, and consistent, the practical applications of the general principles of State and National authority,

hitherto stated in the most general terms in the Federal Constitution and expounded in terminology hardly less general, by Marshall and his successors in the constructive statesmanship of the Supreme Court of an earlier day.

There was doubt on the part of many whether it was *physically* possible that a court, before which issues of great difficulty and public importance were coming day by day, without end and almost without interlude, could in addition perform, in any adequate and acceptable fashion, the task of scrutiny and review of such voluminous records, calling, as each case did, for detailed examination of facts as to the relative adjustments of rates, the income from different classes of traffic, the cost of transportation of the various classes of traffic, and the whole issue of the reasonableness of the returns from the rates as fixed by State authority. As one saw wagon-loads of exhibits brought into hearings before the State Commissions and the Interstate Commerce Commission; as one looked upon the bulky volumes of testimony and formidable libraries of briefs prepared with laborious effort by little armies of specialised counsel; as one saw maps and tariffs piled before special masters and listened to the droning narrative of rate-experts and tariff-men as to the way in which schedules have been built up through the years and the factors necessarily taken into account in even a single community, to say nothing of a State or region,

it seemed to many that the decisive challenge to National regulation had come, and that the whole fabric was imperilled by the physical impossibility that a busy court could perform with thoroughness and fidelity to fundamental principles the recurring task of keeping the rivalries of States and sections within the confines of the fair rights of invested property and the paramount interests of the Nation as a whole.

Such was the challenge to National regulation of essentially National concerns—should that National control in the National sphere be affirmed, clarified, made effective, or was it now to break down, virtually under the weight and complexity of the demand made upon the Supreme Court? Mr. Hughes was the youngest member of the Court; he had an infinite capacity for patient and assiduous application to facts; he had come from the atmosphere of rate and regulative matters in New York State; upon him devolved no small part of the detail work in the rate cases. The statement may with entire accuracy be made that few men of mature years and ripened experience could have *physically* performed the task mastered by Justice Hughes between the close of the argument in the *Minnesota Rate Cases* [1] on April 12, 1912, and the handing down of the remarkable series of opinions which began with the determination of the Minnesota cases on June 9, 1913. His

[1] 230 U. S. Reports, page 352.

opinion in the Minnesota case alone covers a hundred pages, many of them compact with closely marshalled facts. From that date until the filing of the opinion in the so-called Shreveport case [1] a year later less a day, there was a continuance of the same labours, and opinions were prepared in nine cases involving voluminous printed records, intricate facts, and perhaps the most far-reaching issues ever presented to the Court in a single line of cases.

Nor was the answer merely one of the adequate performance of the physical task. For years there had been strain and conflict between State and National authority in many fields, notably that of railroad regulation, because of uncertainty as to the mode of applying concepts almost a century old, to complex conditions which Marshall, Curtis and Storey in no wise anticipated. The task of judicial clarification and definition was an undertaking in constructive statesmanship second perhaps only to that performed by Marshall. It will remain matter for regret to many that the summons to another field of public service led Justice Hughes to leave the Supreme Court with this task of judicial statesmanship splendidly begun, but far from completed. His opinion in the *Minnesota Rate Cases* and subsequently in the Shreveport case will ever be quoted as chart and compass of the metes and bounds of State and National sovereignty in the regulative field.

[1] 234 U. S. Reports, page 342.

These opinions are truly the charter of a vitalised Nationalism.

In the *Minnesota Rate Cases,* there was challenge of the constitutionality of acts of the Minnesota Legislature and the State Railroad and Warehouse Commission, in relation to freight and passenger rates between points wholly within the State. It was asserted, in behalf of the carriers, that the action of the State authorities demanded rates so unremunerative and confiscatory as to place a direct burden upon interstate commerce, accomplish results forbidden by the Interstate Commerce Act, and exceed the permissible limits of State action as to instrumentalities used in interstate commerce, even though the action was in terms addressed only to segments of the use of such instrumentalities exclusively within the State. In the so-called Shreveport case, there was challenge of the dominance of the Federal power over the State power, where it appeared that the State regulative authority had fixed intrastate rates so low and on such a basis, in relation to interstate rates in part through the same territory, as to inflict injury upon interstate commerce and perpetuate results which the Interstate Commerce Commission had expressly found to be discriminatory and violative of the regulative rules declared by Congress as to interstate transportation. The assertion was made that the Federal government

was not empowered by the "commerce clause" to control or direct the doing of anything as to a rate purely intrastate, especially a rate fixed by State authority, and that if Congress found that injurious discriminations against interstate commerce were arising from the relation of interstate and intrastate rates in the territory affected, Congress might authorise the reduction of the former to the plane of the latter, but could not require the carriers or the State Commission to readjust the intrastate rates in accordance with a determination made by the Interstate Commerce Commission as to the proper relationship.

A volume would be necessary for the adequate discussion of the determinations of the Supreme Court in these rate cases alone. The questions of valuation, properties, franchises, depreciation charges, earnings, rate of return, and the like, cannot be here considered at all, although the determinations in these respects will have far-reaching effects in the domain of railroad administration and regulative practice. On the issues of State and National authority, the holdings of the Court, through Justice Hughes, may perhaps be briefly although unsatisfactorily summarised under four headings:

As to the power of Congress over interstate commerce and interstate rates: The authority of Congress over interstate commerce and in-

terstate rates is paramount, dominant, exclusive. This dominance is held to extend to every part and phase of interstate commerce and to every agency and instrumentality by the use of which it is anywhere carried on. It cannot be denied, thwarted or limited through any indirection or through the mere complexity of the transportation business and the inevitable commingling of intrastate with interstate operations and properties. Interstate commerce is National, and the Nation is supreme within the National field.

As to the power of the State over interstate commerce: The State has no authority at all as to interstate *rates,* nor has the State, irrespective of any action by Congress, any power of direct control with respect to those subjects, embraced within the constitutional grant, which are of such a nature as to demand that, if regulated at all, their regulation should be uniform and prescribed by a single authority. As to matters deemed at any time to require a general system or uniformity of regulation, the power of Congress is exclusive. As to other matters admitting of diversity of treatment according to the local conditions, the States may act, up to such time as Congress sees fit to act in that respect. Measures of local improvements, local facilities, protective measures as to safety, health, convenience, morals, or welfare of the people, may be put in force by the States, up

to such time as Congress, in response to a conviction that changed conditions have brought about a National need, sees fit to displace the local regulations with its own paramount and exclusive authority as to any of such matters.

As to the power of the State over intrastate rates: Authority over rates and commerce wholly within the State belongs to the State, and there is reserved to the State plenary power of regulation of intrastate rates and traffic, affected and limited only by the exertion of the National power with respect to interstate commerce and its instruments as utilised also in intrastate commerce. The authority of the State over intrastate rates and commerce is limited or affected only by the actual exercise of the paramount National power, and is not affected by the existence of an unused and dormant Federal power of action for the better protection of interstate commerce.

As to the power of Congress over intrastate commerce and rates: The Nation is equipped with a power, supreme and plenary, to protect its authority over National commerce from being obstructed or destroyed by any opposing action, even the rivalries or counter-wishes of State or local governments. Congress may, in its discretion, for the better regulation and control of interstate commerce, take authority over intrastate rates and transactions of carriers doing an interstate business, and may re-

quire such readjustment of intrastate rates and regulations as the paramount interests of the National commerce may make advisable, even though such intrastate rates and regulations have been determined and prescribed by State authority and have the full approval of the carriers concerned.

In the opinion prepared by Justice Hughes in the *Minnesota Rate Cases,* he explained the ramifications of the subject in great clearness of detail. Only a part of this classic opinion may be quoted within the confines of this volume; it merits reading in entirety:

The controversy thus arises from opposing conceptions of the fundamental law, and of the scope and effect of Federal legislation, rather than from differences with respect to the salient facts.

For the purpose of the present inquiry, the rates fixed by the State must be assumed to be reasonable rates so far as intrastate traffic is concerned; that is, they must be taken to be rates which the State, in the exercise of its legislative judgment, could constitutionally fix for intrastate transportation separately considered. If the State rates are not of this character—a question to be dealt with later—they cannot be sustained in any event; but, assuming them to be otherwise valid, the decree below, with respect to the present branch of the case, rests upon two grounds: (1) That the action of the State imposes a direct burden

upon interstate commerce; and (2) that it is in conflict with the provisions of the Act to Regulate Commerce.

These grounds are distinct. If a State enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the State, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted.

Prior to the Act to Regulate Commerce, carriers fixed their interstate rates free from the actual exertion of Federal control; and under that Act, as it stood until the amendment of June 29, 1906, 34 Stat. 584, c. 3591, the Interstate Commerce Commission had no power to prescribe interstate rates. The States, however, had long exercised the power to establish maximum rates for intrastate transportation. Was this power, apart from Federal action, subject to the limitation that the State could not fix intrastate rates, reasonable as such, generally throughout the State, but only as to such places and in such circumstances that the interstate business of the carriers would not

be thereby affected? That is, was the State debarred from fixing reasonable rates on traffic, wholly internal, as to all State points so situated that as a practical consequence the carriers would have to reduce the rates they had made to competing points without the State, in order to maintain the volume of their interstate business or to continue the parity of rates or the relation between rates as it had previously existed? Was the State, in prescribing a general tariff of reasonable intrastate rates otherwise within its authority, bound not to go below a minimum standard established by the interstate rates made by the carriers within competitive districts? If the State power, independently of Federal legislation, is thus limited, the inquiry need proceed no further. Otherwise it must be determined whether Congress has so acted as to create such a restriction upon the State authority theretofore existing.

(1.) The general principles governing the exercise of State authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several States is supreme and plenary. It is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." The conviction of its necessity sprang from the disastrous experiences under the Confederation when the States vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times ade-

quate to secure the freedom of interstate commercial intercourse from State control and to provide effective regulation of that intercourse as the National interest may demand. The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States. "The genius and character of the whole government," said Chief Justice Marshall, "seem to be that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of State power in hostility to the authorised exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as

such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the National power within its appointed sphere.

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this Court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and when Congress does act, the exercise of its authority overrides all conflicting State legislation.

The principle which determines this classification, underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as

it is governed in the manner that the national legislature constitutionally ordains.

Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it; or upon persons or property in transit in interstate commerce.

They have no power to prohibit interstate trade in legitimate articles of commerce; or to discriminate against the products of other States; or to exclude from the limits of the State corporations or others engaged in interstate commerce or to fetter by conditions their right to carry it on; or to prescribe the rates to be charged for transportation from one State to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection.

But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which, nevertheless, with the acquiescence of Congress, have been controlled by State legislation from the foundation of the Government because of the necessity

that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of National need,

to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

The leading illustrations may be noted. Immediately upon the adoption of the Constitution, Congress recognised the propriety of local action with respect to pilotage, in view of the local necessities of navigation. It was sixty years before provision for Federal license of pilots was made, and even then port pilots were not included. And while Congress has full power over the subject and to a certain extent has prescribed rules, it is still in a large measure subject to the regulation of the States.

A State is entitled to protect its coasts, to improve its harbours, bays and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is conflict with some act of Congress. Plainly, in the case of dams and bridges, interference with the accustomed right of navigation may result. But this exercise of the important power to provide local improvements has not been regarded as constituting such a direct burden upon intercourse or interchange of traffic as to be repugnant to the Federal authority in its dormant state. . . .

State inspection laws and statutes designed to safeguard the inhabitants of a State from fraud and imposition are valid when reasonable in their requirements and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export or by including incidentally those brought into the State and held for

sale in the original imported packages. And for the protection of its game and the preservation of a valuable food supply, the State may penalise the possession of game during the closed season whether obtained within the State or brought from abroad.

Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits. Until the enactment by Congress of the act of April 22, 1908, the laws of the States determined the liability of interstate carriers by railroad for injuries received by their employés while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some States the so-called fellow-servant rule obtained; in others it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule. So, where Congress has not intervened, State statutes providing damages for wrongful death may be enforced not only against land carriers but also against the owners of vessels engaged in interstate commerce where the wrong occurs within the jurisdiction of the State. And, until Congress legislated on the matter, liability for loss of property, on interstate as well as intrastate shipments, was subject to State regulation. Some States allowed an exemption by contract from all or a part of the common law liability; others allowed no exemption. These differences in the applicable laws created inequalities

with respect to interstate transportation, but each State exercised the power inherent in its territorial jurisdiction, and the remedy for the resulting diversity lay with Congress, which was free to substitute its own regulations; and this was done in the recent amendment of Sec. 20 of the Act to Regulate Commerce. It is within the competency of a State to create and enforce liens upon vessels for supplies furnished under contracts not maritime in their nature, and it is no valid objection that the State law may obstruct the prosecution of a voyage of an interstate character. It may also create liens for damages to property on land occasioned by negligence of vessels. Cars employed in interstate commerce may be seized by attachment under State law, in order to compel the payment of debts. And the legislation of the State, safeguarding life and property and promoting comfort and convenience within its jurisdiction, may extend incidentally to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. It has also been held that the State has the power to forbid the consolidation of State railroad corporations with competing lines although both may be interstate carriers and the prohibition may have a far-reaching effect upon interstate commerce.

Again, it is manifest that when the legislation of the State is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce,

it is not rendered invalid because it may affect the latter commerce indirectly. In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favoured and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State. It was an objection of this sort that was urged and overruled in *Kidd* v. *Pearson,* 128 U. S. 1, to the law of Iowa prohibiting the manufacture and sale of liquor within the State, save for limited purposes. When, however, the State in dealing with its internal commerce undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function.

Within the State power, then, in the words of Chief Justice Marshall, is "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government: all which can be most advantageously exercised by the States them-

selves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass. No direct general power over these objects is granted to Congress: and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for National purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given."

And, wherever as to such matters, under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the State power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority.

(2.) These principles apply to the authority of the State to prescribe reasonable maximum rates for intrastate transportation.

State regulation of railroad rates began with railroad transportation. The railroads were chartered by the States and from the outset, in many charters, maximum rates for freight or passengers, or both, were prescribed. Frequently—and this became the more general practice—the board of directors was permitted to fix charges in its discretion, an authority which in numerous instances was made subject to a limitation upon the amount of net earnings. In

several States maximum rates were also established, or the power to alter rates was expressly reserved, by general laws. In 1853, the State of New York fixed the maximum fare for way passengers on the railroads forming the line of New York Central at two cents a mile and this rate, extending to Buffalo and Suspension Bridge, on the boundary of the State, has continued to the present day. As a rule the restrictions imposed by the early legislation were far from onerous, but they are significant in the assertion of the right of control. More potent than these provisions, in the actual effect upon railroad tariffs, was the State canal. It is a matter of common knowledge that the traffic on the trunk lines from the Atlantic seaboard to the West was developed in competition with the Erie Canal, built, maintained and regulated by the State of New York to promote its commerce.

The authority of the State to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the State. This was decided in *Chicago, Burlington & Quincy R. R. Co.* v. *Iowa,* 94 U. S. 155, and other cases. The question was presented by acts of the legislatures of Illinois, Iowa, Wisconsin and Minnesota, passed in the years 1871 and 1874 in response to a general movement for a reduction of rates. The section

of the country in which the demand arose was to a large degree homogeneous and one in which the flow of commerce was only slightly concerned with State lines. But resort was had to the States for relief. In the *Munn Case,* the Court had before it the statute of Illinois governing the grain warehouses in Chicago. Through these elevators, located with the river harbour on the one side and the railway tracks on the other, it was necessary according to the course of trade for the product of seven or eight States of the West to pass on its way to the States on the Atlantic coast. In addition to the denial of any legislative authority to limit charges it was urged that the act was repugnant to the exclusive power of Congress to regulate interstate commerce. The court answered that the business was carried on exclusively within the limits of the State of Illinois, that its regulation was a thing of domestic concern and that "certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." In the decision of the railroad cases, above cited, the same opinion was expressed. The language of the court, however, went further than to sustain the State law with respect to rates for purely intrastate carriage. Thus, the act of Wisconsin covered traffic which started within the State and was destined to points outside, and this was treated as being within the State power.

It became a frequent practice for the States

to create commissions, as agencies of State supervision and regulation, and in many instances the rate-making power was conferred upon these bodies. A summary of such legislation is given in *Interstate Commerce Commission* v. *Chicago, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 495, 496. One of these State laws, that of Mississippi, passed in 1884, came under review in *Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307. The suit was brought to enjoin the Railroad Commission from enforcing the statute against the Mobile and Ohio Railroad Company. It had been incorporated in the States of Alabama, Mississippi, Tennessee and Kentucky, for the purpose of constructing a railroad from Mobile to some point near the mouth of the Ohio River where it would connect with another railroad, thus forming a continuous line of interstate communication between the Gulf of Mexico and the Great Lakes. The Commission as yet had not acted. Sustaining the State power to fix rates upon traffic wholly internal, the Court directed the dismissal of the bill. The State, said the Court (p. 334), "may, beyond all question, by the settled rule of decision in this Court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." In the same case, it was declared that the power of regulation was not a power to confiscate; and that under pretence of regulating fares and freights, the States could not "require a railroad corporation to carry

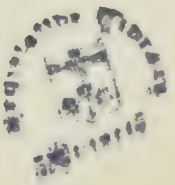
persons or property without reward," or do that which in law amounted "to a taking of private property for public use without just compensation, or without due process of law." (*Id.*, p. 331.)

In *Wabash, St. L. & P. Railway Co.* v. *Illinois, supra,* it was finally determined that the authority of the State did not extend to the regulation of charges for interstate transportation. There the State statute was aimed at discrimination. It was said to have been violated by the railroad company in the case of shipments from points within Illinois to the city of New York. The state court had construed the statute to be binding as to that part of the interstate haul which was within the State although inoperative beyond the boundary. So applied, this court held the act to be invalid.

But no doubt was entertained of the State's authority to regulate rates for transportation that was wholly intrastate. And, in illustrating the extent of State power (*id.*, p. 564), the court selected transportation across the State from Cairo to Chicago and from Chicago to Alton, all boundary points constituting important centres of commerce—the one on Lake Michigan, and the others at the confluence of the Mississippi and Ohio rivers, and of the Mississippi and Missouri rivers, respectively. After reviewing decisions holding State laws to be ineffective which imposed a direct burden upon interstate commerce, including the cases of the *State Freight Tax*, 15 Wall. 232; *Hall* v. *DeCuir*, 95 U. S. 485; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Pickard*

v. *Pullman Southern Car Co.*, 117 U. S. 34, the Court emphasised the distinction with respect to the operation of the statute upon domestic transactions saying: "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question." (*Id.*, p. 577.)

The doctrine was thus fully established that the State could not prescribe interstate rates but could fix reasonable intrastate rates throughout its territory. The extension of railroad facilities has been accompanied at every step by the assertion of this authority on the part of the States and its invariable recognition by this court. It has never been doubted that the State could, if it saw fit, build its own highways, canals and railroads. (*Railroad Company* v. *Maryland*, 21 Wall. 456, 470, 471.) It could build railroads traversing the entire State and thus join its border cities and commercial centres by new highways of internal intercourse to be always available upon reasonable terms. Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in interstate trade and transportation might find it necessary to make readjustments extending from market to market through a wide sphere of influence; but such action of the State would not for that reason be



regarded as creating a direct restraint upon interstate commerce and as thus transcending the State power. Similarly, the authority of the State to prescribe what shall be reasonable charges of common carriers for intrastate transportation, unless it be limited by the exertion of the constitutional power of Congress, is State-wide. As a power appropriate to the territorial jurisdiction of the State, it is not confined to a part of the State, but extends throughout the State—to its cities adjacent to its boundaries as well as to those in the interior of the State. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this State-wide authority controls the carrier and is not controlled by it; and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the State's border, is foreign to our jurisprudence.

If this authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power, that is, one which has not been exerted, but can only be

found in the actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province.

(3.) When Congress, in the year 1887, enacted the Act to Regulate Commerce (24 Stat. 379, c. 104), it was acquainted with the course of the development of railroad transportation and with the exercise by the States of the rate-making power. An elaborate report had been made to the Senate by a committee authorised to investigate the subject of railroad regulation in which the nature and extent of State legislation, including the commission plan, were fully reviewed (Senate Report 46, submitted January 6, 1886, 49th Congress, 1st session). And it was the fact that beyond the bounds of State control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. In the first section of the Act to Regulate Commerce there was inserted the following proviso:

"*Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

When in the year 1906 (act of June 29, 1906,

c. 3591, 34 Stat. 584), Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in section one was reënacted. Again, in 1910, when the act was extended to embrace telegraph, telephone and cable companies engaged in interstate business, the proviso was once more reënacted, with an additional clause so as to exclude intrastate messages from the operation of the statute. Act of June 18, 1910, c. 309, 36 Stat. 539 545. The proviso in its present form reads:

"*Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid."

There was thus excluded from the provisions of the act that transportation which was "wholly within one State," with the specified qualification where its subject was going to or coming from a foreign country.

It is urged, however, that the words of the proviso are susceptible of a construction which would permit the provisions of section three of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, to apply to unreasonable discriminations between localities in different

States, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it. In the present case, there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review.

The question we have now before us, essentially, is whether after the passage of the Interstate Commerce Act, and its amendment, the

State continued to possess the State-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority.

Having regard to the terms of the Federal statute, the familiar range of State action at the time it was enacted, the continued exercise of State authority in the same manner and to the same extent after its enactment, and the decisions of this court recognising and upholding this authority, we find no foundation for the proposition that the Act to Regulate Commerce contemplated interference therewith.

Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorise the Commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the States without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transpor-

tation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject.

How clear was the purpose not to occupy the field thus left to the exercise of State power is shown by the clause uniformly inserted in the numerous acts passed by Congress to authorise the construction of railways across the Indian Territory. This clause, while fixing a maximum passenger rate, made the laws of an adjoining State (in some cases Arkansas, in others Texas, and in others Kansas) applicable to the freight rates to be charged within the Territory; and while the right to regulate rates on the authorised line of railroad was reserved to Congress until a State government should be established, it was expressly provided that, when established, the State should be entitled to fix rates for intrastate transportation—the right remaining with Congress to prescribe rates for such transportation as should be interstate. Within a month after the Act to Regulate Commerce was enacted, two acts were passed by Congress for this purpose with respect to railways extending across the Territory from the Texas to the Kansas boundary. The provision—in both cases in identical language—save that the one referred to the laws of Texas and the other to the laws of Kansas—was as follows (act of Feb. 24, 1887, c. 254, § 4, 24 Stat. 420; act of March 2, 1887, c. 319, § 4, *id.*, 447):

"Sec. 4. That said railroad company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorised by the laws of the State of Texas for services

or transportation of the same kind: *Provided,* That passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway, and messages on said telegraph and telephone lines, *until a State government or governments shall exist in said Territory within the limits of which said railway, or a part thereof, shall be located; and then such State government or governments shall be authorised to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway;* but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State: *Provided, however,* That the rate of such transportation of passengers, local or inter-State, shall not exceed the rate above expressed: *And provided further,* That said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation."

The same provision is found in similar statutes passed in almost every year from 1884 to 1902 and relating to lines intended to serve as highways of interstate communication. When Oklahoma became a State, the laws of other States which were referred to in these various acts ceased to be operative within its limits, and by virtue of its Statehood and with the

direct sanction of Congress, it became authorised to prescribe reasonable maximum rates for intrastate transportation throughout its extent. *Oklahoma* v. *A., T. & S. F. Ry. Co.*, 220 U. S. 277, 285; *Oklahoma* v. *C., R. I. & Pac. Ry. Co.*, 220 U. S. 302, 306.

The decisions of this court since the passage of the Act to Regulate Commerce have uniformly recognised that it was competent for the State to fix such rates, applicable throughout its territory. If it be said that in the contests that have been waged over State laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of State-wide rates for intrastate traffic has seldom been raised, this fact itself attests the common conception of the scope of State authority. And the decisions recognising and defining the State power wholly refute the contention that the making of such rates either constitutes a direct burden upon interstate commerce or is repugnant to the Federal statute.

* * *

To suppose, however, from a review of these decisions, that the exercise of this acknowledged power of the State may be permitted to create an irreconcilable conflict with the authority of the Nation, or that through an equipoise of powers an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the Constitution which, creating a Nation, equipped it with an authority, supreme and plenary, to control National commerce and to prevent that control, exercised in the wisdom of Congress,

from being obstructed or destroyed by any opposing action. But, as we said at the outset, our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. It thus clearly appears that, under the established principles governing State action, the State of Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction and not opposed to any action thus far taken by Congress.

The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right-of-way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day, which will hold to-morrow; that terminals, facilities and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business in other States; that securities are issued against the entire line of the carrier and cannot be divided by States; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in

substance, no regulation of rates can be just, which does not take into consideration the whole field of the carrier's operations, irrespective of State lines. The force of these contentions is emphasised in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by

Congress of its paramount constitutional power.

In the so-called Shreveport case, more accurately known as *Houston and Texas Railway Company* against the *United States*,[1] Justice Hughes declared, in part:

It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating State legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. . . .

Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement;" to adopt measures "to promote its

[1] 234 U. S. Reports, page 342.

growth and insure its safety;" "to foster, protect, control and restrain." Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. . . .

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favoured as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce,

or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of State authority alter the matter, where Congress has acted, for a State may not authorise the carrier to do that which Congress is entitled to forbid and has forbidden. . . .

Congress thus defined the scope of its regulation and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorise the Commission to prescribe intrastate rates and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly —in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier and subject to the authority of the States or agencies created by the States. This was the question recently decided by this Court in the *Minnesota Rate Cases.*

This assertion of the primacy of National over local interests and the supremacy of National over State power in respect to matters inevitably National in scope, did not, however, lead Justice Hughes to deny the possession of broad and plenary regulative powers on the part of the States, even as to instrumentalities used in interstate commerce. Said he, in *Atlantic Coast Line* against *Georgia*,[1] where the carriers denied the powers of the State to regulate interstate trains as to matters concerning which

[1] 234 U. S. Reports, page 280.

Congress had not prescribed a National standard:

The use of locomotive headlights is directly related to safety in operation. It cannot be denied that the protective power of (the State) government, subject to which the carrier conducts its business and manages its property, extends as well to the regulation of this part of the carrier's equipment as to apparatus for heating cars or to automatic couplers. The legislature may require an adequate headlight, and whether the carrier's practice is properly conducive to safety, or a new method affording greater protection should be substituted, is a matter for legislative judgment. But it is insisted that the legislature has gone beyond the limits of its authority in making the specific requirements contained in the act as to the character and power of the light and the dimensions of the reflector. This argument ignores the established principle that if its action is not arbitrary—is reasonably related to a proper purpose—the legislature may select the means which it deems to be appropriate to the end to be achieved. It is not bound to content itself with general directions when it considers that more detailed measures are necessary to attain a legitimate object. Particularisation has had many familiar illustrations in cases where there has been a conviction of the need of it, as, for example, in building regulations and in provisions for safeguarding persons in the use of dangerous machinery. So far as governmental power is concerned, we know of no

ground for an exception in the case of a locomotive headlight.

It cannot be said that the legislature acted arbitrarily in prescribing electric light, in preference to others, or that, having made this selection, it was not entitled to impose minimum requirements to be observed in the use of the light. Witnesses for the plaintiff in error, including its general superintendent of motive power and other employés holding important positions and conversant with the exigencies of operation, presented their objections to the use of the electric headlight. Locomotive engineers who for many years had driven locomotives with such a light testified for the State, expressing a decided opinion in favour of the use of electric headlights in the interest of safe operation and submitting their views in answer to the objections that had been urged. Assuming that there is room for difference of opinion, this fact does not preclude the exercise of the legislative discretion. So far as the question was one simply of expediency—as to the best method to provide the desired security—it was within the competency of the legislature to decide it. . . .

If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardisation of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of State boundaries—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That

remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway.

In the address which he gave before the New York State Bar Association last January, Justice Hughes commented upon the legal bearings of the whole subject with perhaps greater freedom than within the limitations of a judicial opinion:

With Congress using widely its authority over interstate commercial intercourse and the States creating new obligations and remedies, the difficulty and importance of the work of the courts as the interpreters of constitutions and laws has enormously increased. There has never been a time when that work, in view of the intimate relation of legislation to commerce and industry, has been of more vital concern to the country than it is to-day. It is plain that our dual system of government is being subjected to a new and severe strain. Congress is constantly defining the scope of its legislation by reference to the commerce clause, while on the other hand the States, with respect to almost every important activity, press their ac-

tion to the constitutional limit of State power. Thus the Interstate Commerce Act fastens upon interstate transportation, while statutes with similar purpose and thoroughness deal with the transportation that is intrastate, conducted by the same carriers. The Federal Employers' Liability Act applies to persons suffering injury while employed by railroads in interstate commerce, and other acts define what it shall be unlawful for any person to do "in the course of such commerce," either "directly or indirectly." Now, as has been aptly said, interstate commerce is a "practical conception"; it is not determined by mere forms of contracts, or by bills of lading, or by mere technicalities of any sort, that is, by anything short of the substance of the transaction. But, while this is true, interstate commerce is a department of practical affairs which as a rule is segregated only in legal theory. It has no separate existence in economics and is not separately maintained by transportation companies or by those engaged in trade. When is an employé of a railroad company engaged in interstate commerce? There may be no distinction in the mere physical conditions of his work or in his wages. Train crews handle interstate and intrastate traffic indiscriminately; and the practical service of the carrier is determined by the nature of the haul, not by the presence or absence of a State boundary. If, while in his usual work as a train hand, there is an interstate passenger on the train, or goods in a freight car are in the actual course of an interstate journey, his rights and the correlative liability of his employer in

case of injury through the latter's neglect are governed by Federal law; but if the passengers or goods are being moved solely in intrastate transportation, the State law alone determines right and remedy. Again, the same right of way, terminals, tunnels and bridges are used for both classes of traffic. The railroad has economically but one value; but this value must in some way be apportioned to determine whether laws of different jurisdictions permit a fair return upon that value, which for legal purposes must be assigned to each. Certain rate structures which from the standpoint of economic principle and practical judgment are single, are split into legal divisions for the purpose not of academic discussion but of vital control. Our recent reports abundantly show that questions of utmost nicety are constantly being presented in the application of new statutes, and evidence the extreme difficulty of the work of carrying out the will of Congress over the activities within its control while at the same time avoiding encroachment upon the State field. This difficulty is sure to be very keenly appreciated in whatever fields of activity the regulating power of government takes hold. It is the problem of many governments, within one Nation, dealing with portions of an activity which has economic unity. The import of this should be clear to every disinterested observer; a practical people with boundless opportunities and with aspirations unconfined will not be disposed to permit legitimate progress to be needlessly restrained or governed to defeat itself by its own complexity.

His aversion to a Nationalism which, for its own sake, makes war on the autonomy of State and local sovereignties and seeks to transfer purely local concerns to a centralised and "bureaucratic" supervision from the Federal capital, was trenchantly expressed in the same address:

But in the face of the difficulties already upon us, and destined to increase in number and gravity, we remain convinced of the necessity of autonomous local governments. An over-centralised government would break down of its own weight. It is almost impossible even now for Congress in well-nigh continuous session to keep up with its duties, and we can readily imagine what the future may have in store in legislative concerns. If there were centred in Washington a single source of authority from which proceeded all the governmental forces of the country—created and subject to change at its will—upon whose permission all legislative and administrative action depended throughout the length and breadth of the land, I think we should swiftly demand and set up a different system. If we did not have States we should speedily have to create them. We now have them, with the advantages of historic background, and in meeting the serious questions of local administration we at least have the advantage of ineradicable sentiment and cherished traditions. And we may well congratulate ourselves that the circumstances of the formation of a more perfect Union has given us

neither a confederation of States, nor a single centralised government, but a Nation—and yet a Union of States each autonomous in its local concerns. To preserve the essential elements of this system—without permitting necessary local autonomy to be destroyed by the unwarranted assertion of Federal power, and without allowing State action to throw out of gear the requisite machinery for unity of control in National concerns—demands the most intelligent appreciation of all the facts of our interrelated affairs and far more careful efforts in co-operation than we have hitherto put forth.

Within its sphere as defined by the Constitution, the Nation is supreme. The question is simply of the extent of the Federal power as granted; where there is authorised exercise of that power there is no reserved power to nullify it—a principle obviously essential to the maintenance of national integrity, yet continually calling for new applications. Thus, regulations required in the exercise of the judgment committed to Congress for the protection of interstate commerce cannot be made nugatory by the mere commingling of interstate and intrastate transactions. To illustrate, when the validity of the Hours of Service Act was under consideration, it was emphasised that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employés so that those engaged in interstate commerce should be confined to that commerce exclusively. But this fact, it was held, did not preclude the exercise of Federal power. As Congress for

the purpose of promoting safety through the reduction of the risks incident to excessive strain could limit the hours of labour of those engaged in interstate transportation, it necessarily followed that this exertion of its authority could not be frustrated by prolonging the period of service through other requirements of the carriers or by intermingling the duties which related to interstate and intrastate operations. So also, Congress has taken account of the practical exigencies of traffic, and of the interdependence of train movements, and has insisted that cars moving on railroads that are highways of interstate commerce shall be suitably equipped to the end that interstate traffic shall not be exposed to unnecessary danger. Again, Congress has asserted its authority to compel interstate carriers to give to interstate traffic reasonable rates without unjust discrimination; and the question whether interstate trade was left to be destroyed by hostile discrimination under the authority of local governments was decisively answered when the Constitution superseded the Articles of Confederation. On the other hand, while there is this supremacy of national power within the national sphere, it was never intended that throughout the extent of authorised Federal action there could be, in the absence of the actual exercise of Federal power, no employment of State authority. There are undoubtedly many matters of such a nature that but one authority can be exercised over them, and the Federal power must be exercised or none at all. But along with these are

a host of local necessities which from the beginning were viewed as properly engaging the attention of the States in the protection of the interests of their people, albeit interstate commerce was incidentally affected, until Congress should act and by the exertion of its constitutional authority supersede State laws by its own requirements. Varying local exigencies have thus been met. Consequently, in a large measure the Federal power has been dormant—and its exercise has awaited the revelation of national need and the pressure of a gradually forming national sentiment.

In the same address, Justice Hughes hinted at constructive lines along which he thought the resources of the executive and legislative departments of government might most helpfully be employed—lines which he characterised as "the resources of accommodation" under our dual system:

But important as is the judicial function in maintaining the integrity of the constitutional system, it should not be overburdened, nor should work be expected of it which should otherwise be performed. No opportunity should be neglected to secure that wise co-operation which in our network of activities can go far to avoid unnecessary friction. While I cannot enter the domain of legislative policy, may I suggest that the resources of accommodation have not been exhausted; indeed, they have scarcely been touched. Very often the differ-

ences that exist between State and Federal laws governing different phases of the same general activity are due more to accident or lack of forethought than to difference in deliberate purpose. We have had in our States too little regard for the remoter and indirect consequences of legislation. There has been, perhaps, too much thought of questions of abstract power rather than of its sagacious use by those who after all must have a common prosperity or none at all. Some progress, very gratifying, has been made toward unifying our commercial law by the enactment of uniform acts in many States, relating to negotiable instruments, warehouse receipts, bills of lading and sales. But it should be possible to do far more than has been done in the promotion of agreement rather than diversity, inasmuch as our people are to a very great extent inspired by the same ideals. When Congress has legislated on a subject within its province variations in statutes as to corresponding activities in the local field may well be examined to see whether such variations are worth while, or whether it would not be possible to secure harmony without sacrifice of any real local interest. The various administrative commissions easily provide opportunities for deliberation and conference which should be of inestimable importance in avoiding unfortunate differences, particularly when the legislative policies underlying administrative action appear to be identical. Our administrative law is comparatively of recent development and we have hardly begun to consider the practical needs and advantages which go with

the creation of such agencies in Nation and State. In most cases differences yield to a complete understanding of facts, and equipment for competent investigations should diminish the dangers of conflict. It would seem to be clear that bodies of intelligent men dealing as experts, for example, with the interstate and intrastate phases of traffic situations, should be in practical accord, or that at least such differences as may appear to exist should be put to the test of mutual statement, analysis and consultation under plans more definitely designed to prevent unnecessary divergencies. I do not mean to underestimate such voluntary efforts as have been made in this direction; nor shall I presume to suggest the details of possible improvements in administrative schemes with this end in view. But I should think that many of our difficulties might be solved by perfecting the machinery of administration with the direct purpose of promoting harmony of action in dealing with those activities which are conducted in the world of affairs as parts of the same enterprises. It should not be deemed impracticable to secure the protective purposes of State and Nation without injury or needless embarrassment to the honest undertakings upon which both depend.

Another epoch-marking development in the scope of National action for public health, public morals, public safety, public welfare, and the like, has come about through a judicial clearing of the way for an increased exercise

of the Federal power over interstate commerce along lines akin to "police-power" regulations. That is to say, the Supreme Court has, during the past five years, very clearly pointed the way for the nation-wide accomplishment of legislative purposes having to do with the public welfare, through the application of wholesome regulatory restraints to the use of the channels and instrumentalities of interstate commerce. If Congress wished to give nation-wide effectiveness to a measure vitally conserving the public health, morals, or welfare, the way was opened to the doing of this through denying to those engaged in activities hostile to the legislative purpose the right to use the channels of interstate transportation.

This extension of National regulatory power is beyond doubt one of the most far-reaching in the evolution of American constitutional law, and the official reports show Justice Hughes' vital relation to the progressive development of this wholesome doctrine. "Why should not worthless stuff, purveyed under false labels as cures, be made contraband of commerce,—as well as lottery tickets?" he impressively inquired, in his dissenting opinion in the *Johnson* case.[1] The Supreme Court had upheld the power of Congress, in the interests of public morals, to exclude lottery tickets from the mails and from interstate commerce.[2] "If an

[1] *U. S.* vs. *Johnson* (221 U. S. Reports, page 488).
[2] *Champion* vs. *Ames* (188 U. S. Reports, page 331).

article is shipped in interstate commerce, bearing on its label a representation that it is a cure for a given disease, when on a showing of the facts there would be a unanimous agreement that it was absolutely worthless and an out and out cheat," Justice Hughes felt that Congress had defined this to be a "mis-branding" of the article, and that Congress had the power to conserve public health, safety, morals and welfare, by preventing the interstate shipment of so sinister a menace to public health and security in medical treatment.

In the celebrated *Hipolite Egg* case [1] in 1911, the Supreme Court held the object of the Food and Drugs Act to be "to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages." It declared that while "in the original, unbroken packages, they carry their own identification of *contraband of law.*" Concerning this power of Congress to declare to be "contraband of law" and "outlaws of commerce" any articles whose interstate transportation would accomplish results repugnant to the public health, morals or welfare," the Supreme Court, Justice Hughes concurring, declared:

[1] 220 U. S. Reports, page 45.

The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. . . . The question here is whether articles which are *outlaws of commerce* may be seized wherever found. . . . Their confiscation or destruction is the especial concern of the law.

In *Hoke* against the *United States* [1]—one of the so-called "white slave" cases—the power of Congress to regulate interstate commerce in the interests of the public morality and welfare was further commented upon by a unanimous Court, Justice Hughes concurring:

Congress is given power "to regulate commerce with the foreign nations and among the several States." The power is direct; there is no word of limitation in it; and its broad and universal scope has been so often declared as to make repetition unnecessary. . . . Commerce among the States, we have said, consists of intercourse and traffic between their citizens,

[1] 227 U. S. Reports, page 308.

and includes the transportation of persons and property. . . . There is unquestionably a control in the States over the morals of their citizens . . . but there is a domain which the States cannot reach and over which Congress alone has power. . . . Its exertion does not encroach upon the jurisdiction of the States. . . .

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, either independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralisation of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

This is the aim of the law expressed in broad generalisation; and motives are made of determining consequence. Motives executed by actions may make it the concern of Government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed and penalties and prohibitions must be applied. We may illustrate again by the Pure Food and Drugs Act. Let an article be debased by adulteration, let it be

misrepresented by false branding, and Congress may exercise its prohibitive power. It may be that Congress could not prohibit the manufacture of the article in a State. It may be that Congress could not prohibit in all of its conditions its sale within a State. But Congress may prohibit its transportation between the States, and by that means defeat the motives and evils of its manufacture.

The question which Justice Hughes asked in his dissenting opinion in the Johnson case was soon answered by Congress. The extension for which he had contended was made effective. Drugs or purported medicines misbranded as to their curative properties were made "contraband of law," "outlaws of commerce," by the Sherley Amendment, and Justice Hughes, within the present year, wrote for a unanimous Court[1] in applying to a purported "tuberculosis cure" the Congressional enactment and what he called "the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations"—a statement which may be regarded as representing the limit thus far of judicial indication of the scope of Congressional authority under this doctrine.

[1] Seven Cases of *Eckman's Alterative* vs. *U. S.* (239 U. S. Reports, page 510).

The belief is general, among students of the law, that the United States stands only at the beginning of the exercise of increased Federal power for public ends, through legislation enacted along the lines indicated by Justice Hughes and his colleagues. Already the development of the doctrine within the past two or three years has had a notable effect upon the trend of legislation. An instance is the way in which a constitutional basis has been revealed for a National child-labour law, at a time when the "Cry of the Children" has as much meaning for us as for our grandfathers, whose hearts it was written to stir, more than seventy years ago. As it was Senator Beveridge who was the pioneer in arousing a nation-wide interest in the formulation of such a law, so it has been the statesmen of the Supreme Court who have pointed the way for it. The Beveridge proposal aroused antagonism—or at least gave basis for interested antagonism—because it was based on a constitutional concept then vigorously denied by many lawyers. This measure sought to prevent the use of the labour of children in manufacturing processes by imposing prohibitions and penalties on *railroad companies,* who employed no children and engaged in no manufacture. The carriers were to be punished if they carried the products of child labour, and the employers of little children were to be punished only if they made false statements as to such employment. Such a measure

seemed necessarily based on the proposition that Congress had an unlimited power—arbitrary, in its discretion—over the instrumentalities of interstate commerce. Otherwise, Congress could not attach the penalties to acts of carriers themselves doing no wrong. Senator Carmack is said to have wrung from Senator Beveridge even an admission that the latter's bill was based on a theory which carried the extreme implication that Congress had such power over interstate railroads that it could prohibit them from carrying the milk of such cows as were milked by red-headed girls!

Justice Hughes and his colleagues have, however, pointed and cleared the way constructively for a National regulation of child labour on a less debatable basis. The Keating-Owen bill, in the form in which it was pending before the Senate at the time of the writing of this volume, follows more closely the doctrine of the decisions above quoted. It denies to a factory or mine employing children below specified standards of child protection in the public interest, the right to use the instrumentalities and channels of interstate commerce. The employment of children in manufacture or mining is looked upon as evincing an intent, and as disclosing acts, inimical to public health, morals, safety and welfare; and the *employers* of children under such circumstances are to be barred from use of the facilities of interstate transportation. A child-employing establish-

ment is thus placed in the same category with a lottery or with an area in which cattle or persons are generally diseased, and the goods produced in the child-employing establishment are placed in the category of lottery tickets, diseased cattle, obscene printed matter, adulterated drugs, and the like. Therefore, while there may be no inherent differences between the *goods* manufactured in a place where children work and those made in a place where only adults work—and so no basis, short of arbitrary power, for the imposing of penalties on *carriers* transporting the former—there is much difference between the two establishments —one conserving, and the other impinging upon and tearing down, the vigour, health, morality and welfare of the boys and girls who soon will be the men and women of the Nation. The establishment at war with public welfare cannot carry on that war over State boundaries. The Nation localizes, confines to a single State, the power of such an establishment to do more general injury, by denying it the right to move its products into other States, until it eliminates from its mode of doing business the crime against the robustness, morality, education, and joyous childhood of American boys and girls.

Justice Hughes prepared the opinions of the Court upon other and diversified aspects of the necessary adjustments between National and State sovereignty, but it is impracticable in this

volume to do more than refer by footnote to the cases [1] in which were expressed his amplified views of an adequate Nationalism. In subsequent chapters, notably those dealing with pure food laws and the regulation of labour conditions, will be found excerpts from his opinions as to the scope of State and National power in relation to those topics.

[1] *Port Richmond Ferry* vs. *Hudson County* (234 U. S. Reports, page 317); *Sault Ste. Marie* vs. *International Transit Co.* (234 U. S. Reports, page 333); *Anderson* vs. *Pacific Coast Ss. Co.* (225 U. S. Reports, page 187); *Wilmington Transp. Co.* vs. *California R. R. Commission* (236 U. S. Reports, page 151); *Adams Express Co.* vs. *New York* (232 U. S. Reports, page 14); *Philadelphia Co.* vs. *Stimson* (223 U. S. Reports, page 605); *Chicago, etc., Ry. Co.* vs. *Iowa* (233 U. S. Reports, page 334).

CHAPTER III

THE DOCTRINE OF REASONABLE RELATIONSHIP TO A PERMISSIBLE PURPOSE

If a student of modern legislation were to make inquiry for the purpose of forming an estimate as to the social outlook and social statesmanship of a member of an appellate court, his inquiry would probably be along four or five notable lines. He would inquire as to his acceptance and application of the doctrine of reasonable relationship to a permissible public purpose; he would inquire as to his rejection of the doctrine of "freedom of contract" and his willingness to follow through the full consequences of that rejection; he would ask as to his standards of determining what "process" and procedure is "due" and what is arbitrary; he would ask as to his *criteria* of reviewing questions of the remunerativeness or confiscatory consequences of rate and service orders of governmental authorities; and he would search as to his acceptance or rejection of the modern concept of legal and social science in the regulative field, which calls for ascertainment of facts, action in the light of disclosed conditions, and emancipation alike from a mere

traditionalism of form and an unquestioned adherence to predetermined conceptions of law and policy.

A brief commentary upon the judicial course and utterances of Justice Hughes and his colleagues in the Supreme Court may be of value at this juncture:

As to the doctrine of reasonable relationship to the accomplishment of a permissible public purpose: From a social viewpoint, perhaps the most forward-looking event in the legal history of the past decade or so has been the development and extending application of this concept as to the metes and bounds of regulative action for social betterment. From this viewpoint, two questions are presented as to the validity of a regulative measure:

Is there an evil—conditions with which government is called upon or entitled to deal—and does the measure deal with a purpose which government is entitled to effect?

If so, does the legislation in question bear a reasonable relation to that purpose?

For many years, the question of the permissible scope of the exercise of governmental power in behalf of social welfare had caused a great deal of disagreement between the Courts of different jurisdictions, between students of

the history and philosophy of the law, and between champions of opposing schools of thought and action in the realm of public affairs. There was, for example, sharp divergence of standards between the Federal and many State courts, as to the limits of governmental discretion under the concept of "due process" which the Fourteenth Amendment requires the National judicial power to apply and enforce, even as against the action of a sovereign State. One of the difficulties, it is true, was that the National view was perhaps naturally more broad and progressive than the view of many of the older States, but another difficulty was that there was no very definite or understandable formula for determining the boundaries of the regulative power, commonly referred to as the "police power" of government.

Some of the State courts ruled that the "due process" clause permitted legislation to protect the lives, health, morals, and physical safety of the general public or of employés, for example, but little, if anything, beyond that. The New York Court of Appeals said that[1]

Every man's right to life, liberty and property is to be disposed of in accordance with those *ancient* and fundamental principles which were in existence when our Constitutions were adopted.

[1] *Ives* vs. *South Buffalo Ry. Co.* (201 N. Y. Reports, page 271).

On the other hand, the Supreme Court of the United States was giving to the "police power" a very broad and wholesome application, without laying down any very comprehensible standard for determining what was and was not within its limitations. "The power is, and must be from its very nature, incapable of any very exact definition or limitation," said the Court.[1] "Upon it depends the security of the social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." A little later it was observed that the power might be said to "extend to all the great public needs,"[2] and still later it was said,[3] Justice Hughes concurring, that the "police power"

> . . . may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

The inclusion of "public *welfare*" as one of the permissible objects of the "police power" —as distinguished from merely "life, safety, health and morals"—has had a most salutary effect. "Social purpose" has come within the

[1] *Slaughter House Cases* (16 Wallace's [U. S.] Reports, page 36).

[2] *Camfield* vs. *U. S.* (167 U. S. Reports, page 518).

[3] *Noble State Bank* vs. *Haskell* (219 U. S. Reports, page 104).

purview of "public purpose," and there has been a continued and broadening judicial appreciation of the quickened regulative activities of the State.

The development of the doctrine of "reasonable relationship to a public purpose" has given perhaps a new definiteness and stability to the concept of "due process" and the "police power." It has afforded a sound and more workable standard and test. Is there an evil? Are there conditions affected with a public interest or giving rise to a public concern? Is there an aspect of public welfare presented by social phenomena to which attention has been directed by fair inquiry? If so, does the remedy, the particular proposal which the legislature has adopted, the legislation which it has fashioned, seem designed to deal with the evil, the conditions? The Court is of course not called upon to answer this question with guaranty of the suitableness and effectiveness of the expedient; the question is not whether the legislature has chosen the best possible method or put its enactment in the best possible form; the question is whether the measure is reasonably calculated to deal with the conditions and bears a reasonable relation to the accomplishment of the public purpose. If there is room for a difference of honest opinion, the legislature is entitled to decide. In other words, in all fairness, can the Court see that the legislature's proposal bears an actual and reasonable

relation to accomplishing the result? Of course, if it does not, and seems to be only a subterfuge and the public purpose only a pretext, then the measure falls under the Constitutional prohibition. If the measure discloses aught discriminatory and essentially unfair to classes of the community, manifesting a disposition to injure and penalize rather than aid and upbuild, then the measure falls. If the measure is arbitrary in its operation, it likewise falls, for reasons which will be commented on later in this chapter; but the fundamental challenge of the Constitution to the legislature is: Does and can the Court, in all fairness, see that your new law bears a reasonable relation to, and is fairly calculated to be a step forward in bringing about, a result which the legislature is entitled to try to accomplish? If so, the requirements of "due process" have been met, and the measure is within the "police power."

To this doctrine, which has lately been the rallying-point of the champions of economic and industrial legislation before judicial tribunals, Justice Hughes early gave definite and apparently cordial acceptance. It may fairly be said that he has taken a discernible and important part in its wholesome development and fair application. In the first opinion which he wrote on a "social welfare" question, he said:[1]

[1] *Chicago, B. & Q. Ry. Co.* vs. *McGuire* (219 U. S. Reports, page 549).

We pass without comment the criticisms which are made of certain details of the relief plan, for neither the suggested excellence nor the alleged defects of a particular scheme may be permitted to determine the validity of the statute, which is general in its application. The question with which we are concerned is not whether the regulations set forth in the answer are just or unjust, but whether the amended statute transcends the limits of power as defined by the Federal Constitution. . . . The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the Court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law. . . . Freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. . . .

The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national

concern, as for example the regulation of commerce with foreign nations and among the several States. . . .

It is subject also, in the field of State action, to the essential authority of government to maintain peace and security and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the State to require reasonable maximum charges for public service (*Munn* v. *Illinois,* 94 U. S. 113; *C., B. & Q. R. R. Co.* v. *Iowa,* 94 U. S. 155; *Railroad Commission Cases,* 116 U. S. 307; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19), and to prescribe the hours of labour for those employed by the State or its municipalities (*Atkin* v. *Kansas,* 191 U. S. 207), this court has sustained the validity of State legislation in prohibiting the manufacture and sale of intoxicating liquors within the State (*Mugler* v. *Kansas,* 123 U. S. 623; *Crowley* v. *Christensen, supra*); in limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day except in cases of emergency (*Holden* v. *Hardy,* 169 U. S. 366); in prohibiting the sale of cigarettes without license (*Gundling* v. *Chicago,* 177 U. S. 183); in requiring the redemption in cash of store orders or other evidences of indebtedness issued in payment of wages (*Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13); in prohibiting contracts for options to sell or buy grain or other commodity at a future

time (*Booth* v. *Illinois,* 184 U. S. 425); in prohibiting the employment of women in laundries more than ten hours a day (*Muller* v. *Oregon,* 208 U. S. 412); and in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of the weight of the coal as originally produced in the mine (*McLean* v. *Arkansas,* 211 U. S. 539).

The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy.* Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. . . .

In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be

suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. What difference, as to the extent of this power, may exist with respect to particular employments, and how far that which may be authorised as to one department of activity may appear to be arbitrary in another, must be determined as cases are presented for decision. But it is well established that, so far as its regulations are valid, not being arbitrary or unrelated to a proper purpose, the legislature undoubtedly may prevent them from being nullified by prohibiting contracts which by modification or waiver would alter or impair the obligation imposed. If the legislature may require the use of safety devices, it may prohibit agreements to dispense with them. If it may restrict employment in mines and smelters to eight hours a day, it may make contracts for longer service unlawful. In such case the interference with the right to contract is incidental to the main object of the regulation, and if the power exists to accomplish the latter, the interference is justified as an aid to its exercise.

In the "Illinois child-labour law" case [1] he made and applied this admirable statement of the rule:

Where, as here, such legislation has a reasonable relation to a purpose which the State was

[1] *Sturges* vs. *Beauchamp* (231 U. S. Reports, page 320, at page 326).

entitled to effect, it is not open to constitutional objection as a deprivation of liberty or property without due process of law.

As to the requirement of "due process" that no department of government shall inflict upon individual activities and opportunities an exercise of purely arbitrary power: The indefiniteness of the phrase "*due* process" has hid from at least lay understanding a multitude of early judicial errors, and has led not a few people to think there was something radically wrong with our Constitutional and judicial system. The trouble was that economic, social, political and industrial conditions changed so fast, following the Civil War, that it took the law—which is always *last,* and should be, in any social change, although not so hopelessly in arrears—a little time to catch up and readjust its definitions to the new aspect of things. When *is* the process of taking a person's life, liberty, and especially his property, "*due* process"? "*Due* process" is of course a matter of both substance and of procedural form, and it has taken some time to readjust our legal definitions of "*due* process" to the new administrative agencies, legislative forms, and procedural improvements which have come with progress in the law and social outlook.

On the procedural side—the side of form, method and "process"—Justice Hughes has also had an influence and performed a part,

in giving to "due process" at once a rugged, imperishable vitality, a real power to safeguard things which must never be withheld or abandoned, yet at the same time a practicable conformance to improvements of mechanism which involve no withdrawal of fundamentals. To him, as gleaned from many decisions, "*due* process" commits to no particular form or mechanism, fetters the present to no particular device or expedient of the past, interposes no barrier to the betterment in methods of determination which the future may devise; yet back of all this flexibility remains a stalwart adherence to essentials that cannot be denied without calling into action the National judicial power.

The essentials of "*due* process," as he saw them, were those of proper notice and fair opportunity to be heard in advance of determination, a freedom from unfair influence inside or outside the determining tribunal, and action that shows no trace of purely arbitrary character. An open-minded willingness to hear, find, weigh, and fairly act upon, the *facts* makes *any* process "*due.*" Some details of the views of Justice Hughes as to what procedural reforms are permissible and what elements are essential, will be found in Chapter XVII, *post.*

As to abridgement of so-called "freedom of contract" in industrial relationship: For many years the shibboleth of judicial obstruction of

so-called "social welfare" legislation, notably in State courts, was the historic doctrine of "freedom of contract," which of course came down from the time when such a thing existed. When there was an industrial situation in which employer and employé stood on some sort of an equal footing, and the man or woman did not have to go to work in the little shop unless he or she wanted to, because there were plenty of other little shops where they might work, and plenty of ways for them to get a living without working in any industrial establishment at all, the law recognised a kind of mutual freedom of contract, and said that the employer and employé might talk it over and make the kind of a contract they wanted to, each driving the best bargain he could. That kind of a legal doctrine was all right as long as the conditions remained anything like what they were, and as long as the contracting parties stood on some kind of an equality and there was anything approaching *freedom* of contract.

The difficulty arose when conditions changed, and many employers and their lawyers, and a few judges who mostly had been lawyers for employers, wanted to keep the old law "like a strait-jacket," as Justice Hughes said, quoting from Justice Moody, and kept trying to enforce application of the old law to new conditions. When the farm-hand wanted to turn switchman, and found himself confronted with a railroad corporation which operated all the railroads in

his part of the country; when the widow, suddenly thrown on her resources in the little village, came to the mill town, and stood amid whirring fly-wheels and the noise of strange machines and tried to dicker with the indifferent sub-foreman of the only factory in town for a chance to earn enough money for the support and schooling of her dependent children; when the cost of living forced the schoolboy into the shops and the daughter of the family down to the employés' entrance of the jute mill or the box factory, to try to supplement the meagre family earnings, there was not much "freedom of contract" left to be conserved or considered in a community which cared about its own standards of humanity or the physical robustness of its next generation.

Justice Hughes quickly made known his concurrence in the view many times expressed by the Supreme Court that

> There is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be made at all . . . and the power of government extends to the denial of the liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests.[1]

In the first opinion which he wrote for the Court in relation to a regulative topic he quoted

[1] *Atlantic Coast Line R. R. Co.* vs. *Riverside Mills* (219 U. S. Reports, page 186).

at length [1] from the classic repudiation of the "freedom of contract" theory in *Holden* against *Hardy*,[2] to the effect that

The fact that both parties are of full age and competent to contract does not necessarily deprive the State of power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."

Throughout his Supreme Court service he rigorously applied this doctrine, and, as in the *McGuire* case,[1] he declared many amplifications of it by holding that the parties to an industrial contract had no right to make agreements altering or evading, as to themselves, the public policy declared in behalf of the paramount public interest.

As to the requirement that regulatory action shall not amount to a "confiscation" of the property of those entitled to earn a fair return:

[1] *Chicago, B. & Q. Ry. Co.* vs. *McGuire* (219 U. S. Reports, page 549).

[2] 169 U. S. Reports, page 397.

Within the necessary limits of this volume, it is not practicable to discuss the principles which Justice Hughes laid down, notably in the *Minnesota Rate Cases*[1] and those which followed it, as to the ascertainment of the property values on which the returns from the business of a public service corporation are to be figured, and the basis on which determination must be made whether the rates under attack are or are not "confiscatory." It may be sufficient to indicate, at this point, the fundamentals of legal and economic standards, which he felt should govern the action of the Commissions and Legislatures in determining, and of the Courts in reviewing, rates prescribed by regulative authority.

In *Northern Pacific Railway Company* against *North Dakota*,[2] he said:

> The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they are granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve

[1] 230 U. S. Reports, page 352.
[2] 236 U. S. Reports, page 595.

without unjust discrimination. These duties are properly called public duties, and the State within the limits of its jurisdiction may enforce them. The State may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order and convenience.

But, broad as is the power of the regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. . . .

We have, then, to apply these familiar prin-

ciples to a case where the State has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost or without substantial compensation in addition to cost. We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called "out-of-pocket costs," or "actual" expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities.

In *Louisville and Nashville R. R. Co.* against *Garrett*,[1] he said:

. . . prescribing rates for the future is an act legislative, and not judicial, in kind. . . . It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body. . . .

The contention is that, before the Commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to "hear such statements, arguments or evidence offered by the parties" as it may deem relevant, and it is in case it determines that the carrier is "guilty of extortion" that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and, it might be said, necessarily—even without the express command of the statute—would the Commission ascertain whether the former, or existing, rate, was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for the future, there would be no invasion of the province of the judicial department. Even

[1] 231 U. S. Reports, page 298.

where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognised that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is "the nature of the final act" that determines "the nature of the previous inquiry." . . . The right of the carrier to make its own intrastate rates is subject to the law of the State constitutionally enacted. In the absence of a legislative rate, it is the province of the courts in deciding cases that arise between shippers and carriers to pass upon the reasonableness of the compensation which the carrier has demanded for its services. In so doing, the courts apply the common law. But it is the province of the legislature to make the law; and when the legislature, or the body acting under its authority, establishes the rate to be thereafter charged by the carrier, it is the duty of the courts to enforce the rule of law so made unless the constitutional limits of the rate-making power have been transgressed. The rate-

making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the Railroad Commission exercising its delegated power. It may be assumed that the statute of Kentucky forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence and arguments submitted, and a determination by the Commission whether the existing rates were excessive. But, on these conditions being fulfilled, the questions of fact which might arise as to the reasonableness of the existing rates in the consideration preliminary to legislative action would not become, as such, judicial questions to be reëxamined by the courts. The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the Commission went beyond the domain of the State's legislative power and violated the constitutional rights of property by imposing confiscatory requirements. . . . Undoubtedly, a State may permit appeals to its courts from the rate-making orders of its Railroad Commission and, upon the review of such orders, it may expressly authorise its judicial tribunals to investigate and decide questions which would

otherwise not belong to them, or even to act legislatively. But the guaranties of the Fourteenth Amendment do not entitle the carrier to the exercise by the courts of such extra-judicial authority.

As to the belief that regulative legislation and governmental action should be based upon, and should from time to time be shaped according to, a thorough disclosure of the relevant social facts, rather than predetermined concepts of Constitutional construction, economic theory, or governmental polity: More than by anything else—even more than by the formidable array of forward-looking decisions which bear his name and the imprint of the free-spirited play of his facile mind—the unmistakable alignment of the statesmanship of Mr. Hughes with the constructive social statesmanship of his day and age is established by his freedom from academic theorising and economic preconception, and his willingness to face facts as from time to time disclosed. In intimate knowledge of the actualities of industrial conditions—for example, of the atmosphere of the plant of a great steel corporation or a syndicate of textile manufactories, or of the actual environment in which men and women, boys and girls of factory towns have so much difficulty in preserving the good, the true and beautiful in their lives—he has perhaps not the grasp and

perspective possessed by men who have been grappling at first hand with these problems during most of their lives. But this thing stands out through his executive and judicial career: He has a passion for quickly finding out the facts, and when he finds them, and finds them all, he follows them with a fidelity and a free readjustment of policy to experience, which, after all, is the real test of the highest progressive statesmanship in a period of economic and social reconstruction.

This pragmatism and freedom from preconception is likewise of the essence of American institutions, although it has at times seemed absent from American statesmanship. As Von Holst says, in his "Constitutional Law of the United States":

> Like every Constitution which has or can have a real life, that of the United States of America is a result of actual circumstances of the past and the present, and not a product of abstract academic theorising. . . . A Constitution which resembles a Chinese shoe can suit only a Nation which has sunk into Chinese inertia. . . . The real essence of the Constitution, as it takes concrete shape in legislation, must grow and change with the advancing public and private life of the people. . . . If the statesman is bound to be, in the practical discharge of his duties, a conscientious jurist, the jurist must, in his work of examination and testing, keep always in mind the point of view of the statesman.

Perhaps it has been a lifetime fondness for the physical sciences in hours of relaxation, perhaps a natural bent of mind or the hard lesson of experience at the Bar and in great legislative inquiries, that has given to Mr. Hughes this quiet, unpretentious, thorough-going fondness for a fact and aversion to merely academic theorising and preconception; but his pragmatism of outlook is of the grass roots of progressive and constructive statesmanship, in judicial as well as administrative position. As Professor Roscoe Pound, perhaps the most clear-sighted of all American students of modern public law, said, in 1909:

Jurisprudence is the last in the march of the sciences away from the method of deduction, from predetermined conceptions. The sociological movement in jurisprudence, the movement for pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than assumed first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument, has scarcely shown itself as yet in America.

The predominance of the varying social factor has, from a somewhat different angle, been expressed by Justice Holmes of the Supreme Court, in his observation that

. . . in law we are dealing almost wholly with considerations of social advantage which very rarely permit of *quantitative* determination.

The broad bearings of the proper interpretation and application of the "Bills of Rights" were elaborated upon by Justice Hughes before the New York State Bar Association last January:

Recurring to the work of the courts,—it is evident that legislative activity is constantly raising questions involving not simply the constitutional adjustment of national and State power, but also the application of the historic clauses of our Bills of Rights securing life, liberty and property. Here, also, our system is under an increased strain as efforts to impose new obligations are brought to the constitutional test. In view of the impossibility of comprehensive definition of the content of the great guaranties of due process and equal protection, and of the necessity for what Mr. Justice Miller called the "gradual process of judicial inclusion and exclusion, as the cases presented for decision require," there is peculiar danger of defective generalisation in a critical estimate of results. For a fair view of judicial work in this field, it must be judged in its entirety and without losing sight of the broad range of legislative discretion which is every day recognised despite constant efforts to induce judicial decision upon matters which are essentially mere

questions of legislative expediency and over which the courts have no constitutional authority. Even with respect to procedure, which is of the essence of due process, it has repeatedly been held that there was no intention by the adoption of the Fourteenth Amendment to confine State practice to archaic forms. For, as Mr. Justice Moody said, in *Twining* v. *New Jersey,* if that were so, "the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a strait-jacket, only to be unloosed by constitutional amendment," and that, he continued, quoting from Mr. Justice Matthews in *Hurtado* v. *California,* would be "to deny every quality of the law but its age, and to render it incapable of progress or improvement." Thus it has been found, for example, that there was nothing in the guaranty of due process of law contained in the Fourteenth Amendment which required a State to proceed by indictment by a grand jury (instead of by information) or by trial by a petit jury of twelve persons in prosecutions for infamous crimes, or from dispensing with the exemption from compulsory self-incrimination. And in the operation of this amendment according to our established constitutional doctrine as a restriction upon the enactment of substantive legislation, it is manifest that the prohibition was not intended to override legislative action by the views of judges as to its wisdom. The amendment was the affirmation of individual rights deemed to be fundamental. It was incorporated in the Constitution with full knowledge of the judicial duty to apply the su-

preme law in the decision of controversies. What was thus sought was not a privilege to deny the legislative authority to enact reasonable measures for the promotion of the safety, health, morals and welfare of the people, not to make improvement or rational experimentation impossible, but to preserve and enforce the primary and fundamental conceptions of justice which demand proper notice and opportunity to be heard before a competent tribunal in advance of condemnation, immunity from the confiscation of property, and, with respect to every department of government, freedom from the exercise of purely arbitrary power. The perpetuity of this judicial function characteristic of our system, in my judgment, lies with the courts themselves rather than with their critics. With the alternative of legislative power, uncontrolled no matter how indulged, the people have preferred the interposition of the judicial scrutiny in order to conserve what have been deemed to be the essentials of liberty. It is not a function likely to be disturbed so long as judges in the discharge of their delicate and difficult duty exhibit a profound knowledge and accurate appreciation of the facts of commercial and industrial activity, and by their intelligence and fidelity in the application of the Constitution according to its true intent commend its guaranties to the judgment of a fair-minded people jealous alike of public rights and individual opportunities.

CHAPTER IV

THE SAFEGUARDS AGAINST ADULTERATION AND MIS-BRANDING OF FOODS AND DRUGS

One of the notable public services performed by Mr. Hughes as a Justice of the Supreme Court was in connection with the Food and Drugs Act of 1906 and similar statutes, State and Federal, enacted to aid the public in protecting itself from "notorious abuses" in connection with the impurity of foods and drugs and the falsity of representations made as to their quality, constituents, and curative properties. To the interpretation and application of these enactments and the analysis of the intricate trade conditions on which their application often hinges, he brought a wealth of administrative experience, a mind accustomed to the exact facts of physical science and commercial life, and a broad understanding of the conditions with which the community was trying to grapple, in this field so largely new to administrative law.

The first dissenting opinion[1] which he wrote as a member of the Supreme Court dealt with

[1] *U. S.* vs. *Johnson* (221 U. S. Reports, page 488).

the Food and Drugs Act of 1906. Congress had prescribed penalties for what it termed the "mis-branding" of drugs, and a man named Johnson was charged with delivering for shipment in interstate commerce packages and bottles of drugs alleged to have been "misbranded" within the meaning of the Act. Certain of the bottles were labelled "Cancerine tablets" and "Cancerine"; the combination was known as "Dr. Johnson's Mild Combination Treatment for Cancer"; and the labels contained other statements explaining at length the curative properties of the contents, if taken in treatment of cancer or other malignant maladies. The majority of the Court were of the opinion that inasmuch as fraudulent "misbranding" necessarily consisted of mis-statements of *fact,* rather than of *opinion,* the statute must be construed to prohibit false statements only as to the identity of the article—for example, as to its purity, quality, strength, ingredients, and the like—and could not be held to condemn false statements by the manufacturer as to what the article would cure.

Justice Hughes entered emphatic dissent from this view, and Justices Harlan and Day concurred with him. To label a worthless liquid a cancer curative and to sell tablets of inert matter with assurance of its proved efficacy in relief from deadly diseases, seemed a false representation of the principal *fact* as to the article sold, and he urged with great earnestness that

Congress had aimed at false statements of *fact* as to curative properties of a drug, at least no less than at anything else falsely asserted as to it. The majority construction seemed therefore to defeat the legislative purpose and leave the Act largely ineffective. He said, in part:

According to the construction placed upon the statute by the court below in quashing the indictment, if one puts upon the market, in interstate commerce, tablets of inert matter or a liquid wholly worthless for any curative purposes as he well knows, with the label "Cancer Cure" or "Remedy for Epilepsy," he is not guilty of an offence, for in the sense attributed by that construction to the words of the statute he has not made a statement regarding the article which is false or misleading in any particular.

I fail to find a sufficient warrant for this limitation, and on the contrary, it seems to me to be opposed to the intent of Congress and to deprive the act of a very salutary effect. . . .

It is, of course, true, that when Congress used the words "false or misleading statement" it referred to a well-defined category in the law and must be taken to have intended statements of *fact* and not mere expressions of opinion. The argument is that the curative properties of articles purveyed as medicinal preparations are matters of opinion, and the contrariety of views among medical practitioners, and the conflict between the schools of medicine, are impressively described. But, granting the wide do-

main of opinion, and allowing the broadest range to the conflict of medical views, there still remains a field in which statements as to curative properties are downright falsehoods and in no sense expressions of judgment. This field I believe this statute covers. . . .

The question then is whether, if an article is shipped in interstate commerce, bearing on its label a representation that it is a cure for a given disease, when on a showing of the facts there would be a unanimous agreement that it was absolutely worthless and an out and out cheat, the act of Congress can be said to apply to it. To my mind the answer appears clear. . . .

Nor does it seem to me that any serious question arises in this case as to the power of Congress. I take it to be conceded that mis-branding may cover statements as to strength, quality and purity. But so long as the statement is not as to matter of opinion, but consists of a false representation of fact--in labelling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless—there would appear to be no basis for a constitutional distinction. It is none the less descriptive—and falsely descriptive—of the article. Why should not worthless stuff, purveyed under false labels as cures, be made contraband of interstate commerce,—as well as lottery tickets?

This was in May of 1911. The following year Congress amended the Food and Drugs Act, by

the so-called "Sherley Amendment," which provided that for the purposes of that Act a drug should be deemed to be "mis-branded":

> If its package or label shall bear or contain any statement, design or device regarding the curative or therapeutic effect of such article . . . which is false and fraudulent.

This was of course the orderly procedure in a responsible democracy: If the Court, as the agency of the most expert interpretation of the written statutes, finds that the language thus far used is not sufficient to accomplish what was probably the legislative purpose, prompt action by the legislative branch of government clears the difficulty and makes unmistakable the intent to reach by legislation the particular abuse as to which there was question of the efficacy of the original enactment. Congress having thus given legislative sanction to the interpretation which Justice Hughes had unsuccessfully from the first endeavoured to have the Court place upon the term "misbranding," the Supreme Court, on January 10, 1916, through an opinion[1] written by Justice Hughes, unanimously upheld the constitutionality of the Sherley Amendment and sustained the condemnation and seizure of cases of drugs known as "Eckman's Alterative," which were

[1] Seven Cases of *Eckman's Alterative* vs. *U. S.* (239 U. S. Reports, page 510).

sent out with circulars containing the untrue statement: "Effective as a preventative for pneumonia." "We know that it has cured and has and will cure tuberculosis."

The last of the cases decided by Justice Hughes under the Food and Drugs Act involved the long-litigated properties of "Coca Cola" and the propriety of its shipment in interstate commerce. The Federal Government had, under the provisions of that Act, filed a libel for the condemnation of certain cases of Coca Cola which had been seized while in course of transportation, for sale, from Atlanta to Chattanooga. The charge of the Government was that the product was both "adulterated" and "mis-branded," within the meaning of the statute. The claim as to adulteration was, in substance, that the beverage contained "an added poisonous or other added deleterious ingredient"—caffeine—which rendered the product harmful to health. The claim as to "mis-branding" was that the name "Coca Cola" was a representation of the presence of both "coca" and "cola"; that the beverage in fact contained no coca and very little, if any, cola; and that accordingly the product was but an "imitation" of those substances, offered for sale under their "distinctive name," within the inhibition of the statute.

The Coca Cola Company at once claimed the goods which the Government had seized, and

demanded a jury trial, as was its right. The answer of the Coca Cola Company admitted that the product contained as one of its ingredients "a small portion of caffeine," but denied that the caffeine in this quantity was either an "added ingredient," within the meaning of the law, or "an added deleterious ingredient which may render such article injurious to health." The company also denied that there were any such substances known as either "coca" or "cola" under "their own distinctive names," and asserted that the beverage did, however, contain certain elements or substances derived from cola nuts and coca leaves, which the company said was sufficient to require dismissal of a "mis-branding" charge.

After taking a great deal of testimony, the United States District Judge who heard the case directed a verdict in favour of the Coca Cola Company, without letting the jury pass upon the issues, and the Circuit Court of Appeals sustained his action. The question before the Supreme Court, therefore, was whether the Government was right in its contentions, at least to the extent that the disputed questions of fact as to the nature and effect of Coca Cola and its ingredients should have been submitted to the jury. Justice Hughes, in an opinion [1] handed down by the Court on May 22, 1916, sustained fully the Government's contentions as to the vitality and efficacy of the Food and

[1] *U. S.* vs. *Coca Cola Co.* (241 U. S. Reports, page 265).

Drugs Act, and sent the case back for determination in the light of the interpretation placed upon the statute by the highest Court.

Recognising "the extreme importance of the question thus presented with respect to the application of the Act to articles of food sold under trade names," Justice Hughes' devotion to realities and his rugged common sense in analysis of trade conditions led him to clear away the elaborate artifice of statutory construction with which it was sought to paralyse the practical workings of the law. He held with directness and conciseness that

> The facts that a formula has been made up and followed and a distinctive name adopted do not suffice to take an article from the reach of the statute; that the standard by which the combination in such a case is to be judged is not necessarily the combination itself; that a poisonous or deleterious ingredient with the stated injurious effect may still be an added ingredient in the statutory sense, although it is covered by the formula and made a constituent of the article sold.

Likewise he ruled that the terms "adulteration" and "mis-branding" are used in the statute in a special sense, have their own glossary in that use, and are not controlled by their ordinary definitions. For example, "we cannot . . . assume that simply because a prepared food has its formula and distinctive name, it is

not, as such, adulterated. . . . It is plain that the article may be 'adulterated,' if in fact it contains an 'ingredient deleterious or detrimental to health.'" Again, "The substance which renders the article injurious, and the introduction of which causes 'adulteration,' may be one of the 'component parts, or constituents, of the article which is the subject of the described traffic.'" Finally, he held that "proprietary foods, sold under distinctive names, are within the purview of the provision" against "adulteration" and "mis-branding," and this without regard to whether "they were already on the market when the statute was passed."

Justice Hughes' reasoning upon some of the points involved is strikingly direct and pragmatic:

Having these considerations in mind, we deem it to be clear that, whatever difficulties there may be in construing the provision, the claimant's argument proves far too much. We are not now dealing with the question whether the caffeine did, or might, render the article in question injurious; that is a separate inquiry. The fundamental contention of the claimant, as we have seen, is that a constituent of a food product having a distinctive name cannot be an "added" ingredient. In such case, the standard is said to be the food product itself which the name designates. It must be, it is urged, this "finished product" that is "adulterated." In that view, there would seem to

be no escape from the conclusion that however poisonous or deleterious the introduced ingredient might be, and however injurious its effect, if it be made a constituent of a product having its own distinctive name it is not within the provision. If this were so, the statute would be reduced to an absurdity. Manufacturers would be free, for example, to put arsenic or strychnine or other poisonous or deleterious ingredients with an unquestioned injurious effect into compound articles of food, provided the compound were made according to formula and sold under some fanciful name which would be distinctive. When challenged upon the ground that the poison was an "added" ingredient, the answer would be that without it the so-called food product would not be the product described by the name. Further, if an article purporting to be an ordinary food product sold under its ordinary name were condemned because of some added deleterious ingredient, it would be difficult to see why the same result could not be attained with impunity by composing a formula and giving a distinctive name to the article with the criticised substance as a component part. We think that an analysis of the statute shows such a construction of the provision to be inadmissible. Certain incongruities may follow from any definition of the word "added," but we cannot conclude that it was the intention of Congress to afford immunity by the simple choice of a formula and a name. It does not seem to us to be a reasonable construction that in the case of "proprietary foods" manufac-

tured under secret formulas Congress was simply concerned with additions to what such formulas might embrace. Undoubtedly, it was not desired needlessly to embarrass manufacturers of "proprietary foods" sold under distinctive names, but it was not the purpose of the Act to protect articles of this sort regardless of their character. Only such food products as contain "no unwholesome added ingredient" are within the saving clause and in using the words quoted we are satisfied that Congress did not make the proprietary article its own standard.

Equally extreme and inadmissible is the suggestion that where a "proprietary food" would not be the same without the harmful ingredient, to eliminate the latter would constitute an "adulteration" under § 7, subdivision Third, by the abstraction of a "valuable constituent." In that subdivision Congress evidently refers to articles of food which normally are not within the condemnation of the Act. Congress certainly did not intend that a poisonous or deleterious ingredient which made a proprietary food an enemy to the public health should be treated as a "valuable constituent," or to induce the continued use of such injurious ingredients by making their elimination an adulteration subject to the penalties of the statute.

It is apparent, however, that Congress in using the word "added" had some distinction in view. In the Senate bill (for which the measure as adopted was a substitute) there was a separate clause relating to "liquors," provid-

ing that the article should be deemed to be adulterated if it contained "any added ingredient of a poisonous or deleterious character"; while in the case of food (which was defined as excluding liquors) the article was to be deemed to be "adulterated" if it contained "any added poisonous or other ingredient which may render such article injurious to human health." Cong. Rec., 59th Cong., 1st Sess., Vol. 40, p. 897. In explaining the provision as to "liquors," Senator Heyburn, the chairman of the Senate Committee having the bill in charge, stated to the Senate (*Id.*, p. 2647): "The word 'added,' after very mature consideration by your committee, was adopted because of the fact that there is to be found in nature's products as she produces them, poisonous substances to be determined by analysis. Nature has so combined them that they are not a danger or an evil—that is, so long as they are left in the chemical connection in which nature has organised them; but when they are extracted by the artificial processes of chemistry they become a poison. You can extract poison from grain or its products and when it is extracted it is a deadly poison; but if you leave that poison as nature embodied it in the original substances it is not a dangerous poison or an active agency of poison at all.—So, in order to avoid the threat that those who produce a perfectly legitimate article from a natural product might be held liable because the product contained nature's poison it was thought sufficient to provide against the adding of any new substance that was in itself a poison, and thus emphasising the

evils of existing conditions in nature's product. That is the reason the word 'added' is in the bill. Fusel oil is a poison. If you extract it, it becomes a single active agency of destruction, but allow it to remain in the combination where nature has placed it, and, while it is nominally a poison, it is a harmless one, or comparatively so." For the Senate bill, the House of Representatives substituted a measure which had the particular provisions now under consideration in substantially the same form in which they were finally enacted into law. (Section 7, subd. Fifth; § 8, subd. Fourth, provisos.) And the Committee of the House of Representatives in reporting this substituted measure said (H. R. Report, No. 2118, 59th Cong., 1st Sess., pp. 6, 7, 11): "The purpose of the pending measure is not to compel people to consume particular kinds of foods. It is not to compel manufacturers to produce particular kinds or grades of foods. One of the principal objects of the bill is to prohibit in the manufacture of foods intended for interstate commerce the addition of foreign substances poisonous or deleterious to health. The bill does not relate to any natural constituents of food products which are placed in the foods by nature itself. It is well known that in many kinds of foods in their natural state some quantity of poisonous or deleterious ingredients exists. How far these substances may be deleterious to health when the food articles containing them are consumed may be a subject of dispute between the scientists, but the bill reported does not in any way consider that question. If, however, poison-

ous or deleterious substances are added by man to the food product, then the bill declares the article to be adulterated and forbids interstate traffic."

This statement throws light upon the intention of Congress. Illustrations are given to show possible incongruous results of the test, but they do not outweigh this deliberate declaration of purpose; nor do we find in the subsequent legislative history of the substituted measure containing the provision any opposing statement as to the significance of the phrase.

With the way thus cleared for a remedial application of the statute, Justice Hughes took up the two questions involved in the facts of the case at bar. Was the caffeine an "added ingredient"? As to this he said:

In the present case, the article belongs to a familiar group; it is a syrup. It was originally called "Coca Cola Syrup and Extract." It is produced by melting sugar,—the analysis showing that 52.64 per cent. of the product is sugar and 42.63 per cent. is water. Into the syrup thus formed by boiling the sugar, there are introduced colouring, flavouring, and other ingredients, in order to give the syrup a distinctive character. The caffeine, as has been said, is introduced in the second or third "melting." We see no escape from the conclusion that it is an "added" ingredient within the meaning of the statute.

Was the caffeine "poisonous" or "deleterious"? This question he says the jury should have been permitted to decide and so there must be a re-trial, with an application of the statute as defined by the Supreme Court:

Upon the remaining question whether the caffeine was a poisonous or deleterious ingredient which might render the article injurious to health, there was a decided conflict of competent evidence. The Government's experts gave testimony to the effect that it was, and the claimant introduced evidence to show the contrary. It is sufficient to say that the question was plainly one of fact which was for the consideration of the jury.

In a manner equally pointed and cogent the question of "mis-branding" involved in the name "Coca Cola" was discussed, and the rule laid down that although what the statute refers to as a "distinctive name" may be altogether arbitrary, it must be one that distinguishes the article; and where a "distinctive name" is formed by the uniting of several names, each descriptive of a known substance or article, it amounts to a "mis-branding" condemned by law, if the article sold does not contain the articles generally known individually by any of such names. The opinion said, on this point:

We are thus brought to the question whether if the names coca and cola were respectively descriptive, as the Government contends, a combination of the two names constituted a "distinctive name" within the protection of the proviso in case either of the described ingredients was absent. It is said that "coca" indicates one article, and "cola" another, but that the two names together did not constitute the distinctive name of any other substance or combination of substances. The contention leads far. To take the illustration suggested in argument, it would permit a manufacturer, who could not use the name chocolate to describe that which was not chocolate, or vanilla to describe that which was not vanilla, to designate a mixture as "Chocolate-Vanilla," although it was destitute of either or both, provided the combined name had not been previously used. We think that the contention misses the point of the proviso. A mixture or compound may have a name descriptive of its ingredients or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients are not primarily distinctive names save as they appropriately describe the compound with such ingredients. To call the compound by a name descriptive of ingredients which are not present is not to give it "its own distinctive name" —which distinguishes it from other compounds —but to give it the name of a different compound. That, in our judgment, is not protected by the proviso, unless the name has achieved

a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning.

In the present case we are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always insisted, and now insists, that its product contains both. But if the name was found to be descriptive, as charged, there was clearly a conflict of evidence with respect to the presence of any coca ingredient. We conclude that the court erred in directing a verdict on the second count.

During the past five years, the Supreme Court has likewise given great vitality to the power of the States to enact and enforce effective regulations against impurity in foods and drugs and the presence of deleterious substances therein. In *Price* v. *Illinois*,[1] Mrs. Price had been found guilty, in the Chicago Municipal Court, of violating the "pure food" statute of that commonwealth. She had sold in Chicago a preservative compound well known to housewives under the name of "Mrs. Price's Canning Compound." The State authorities charged,

[1] *Price vs. Illinois* (238 U. S. Reports, page 446).

and the State Courts had determined, that this so-called "preservative of food" was "unwholesome and injurious, in that it contained boric acid." Mrs. Price promptly appealed to the Supreme Court of the United States, and Justice Hughes wrote the opinion of the Court in her case.

The Supreme Court of the United States of course did not undertake to say whether boric acid, which Mrs. Price's "canning compound" concededly contained, was in fact "injurious to health or to the human system." These nine men of the law behind a long bench down in a Washington court-room did not try to decide that, and the provisions of the Constitution as to the jurisdiction of the Supreme Court did not put that task upon them. The Supreme Court said, as it does in all similar cases, that the State authorities, with the aid of their chemists and their health experts, are entitled to form their own judgment as to that, and unless their determination that "boric acid" is unhealthful appears under all the evidence to be so altogether unreasonable and arbitrary that the trained minds of the Court can discover no fair or probable foundation for such a conclusion, the Supreme Court has no right or reason to interfere with the action of the State experts. If the house-wives of Illinois want Mrs. Price's "canning compound" taken out of the category of prohibited articles, and want to use this boric acid preservative in their fall canning,

they should let their views be known to their legislators, and vote accordingly; the Supreme Court cannot interfere. The Court, in other words, said, in substance, that it was no answer to the action of the State authorities and the State Courts to say that the injurious effects of boric acid are debatable, because if the effects are debatable, the legislature of Illinois is entitled to use its own best judgment, with the aid of the most expert advisers it can obtain, and the matter rests with the people of Illinois, not a Court in Washington.

Justice Hughes wrote, in part, as follows, in the *Price* case:

> The State has undoubted power to protect the health of its people and to impose restrictions having reasonable relation to that end. The nature and extent of restrictions of this character are matters for the legislative judgment in defining the policy of the State and the safeguards required. In the avowed exercise of this power, the legislature of Illinois has enacted a prohibition—as the statute is construed—against the sale of food preservatives containing boric acid. And unless this prohibition is palpably unreasonable and arbitrary we are not at liberty to say that it passes beyond the limits of the State's protective authority. . . .
>
> The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was unques-

tionably harmless with respect to its contemplated uses, that is, that it indubitably must be classed as a wholesale article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided. It is not a case where the legislature has confined its action to the prohibition of that which is described in general terms as unwholesome or injurious, leaving the issue to be determined in each case as it arises. The legislature is not bound to content itself with general directions when it considers that more detailed measures are necessary to attain a legitimate object. Legislative particularisation in the exercise of protective power has many familiar illustrations. The present case is one of such particularisation, where the statute—read as the State Court reads it—specially prohibits preservatives containing boric acid. The legislature thus expressed its judgment and it is sufficient to say, without passing upon the opinions of others adduced in argument, that the action of the legislature cannot be considered to be arbitrary. Its judgment appears to have sufficient support to be taken out of that category. See *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 51; Circular No. 15 (June

23, 1904), Bureau of Chemistry, Food Inspection Decision 76 (July 13, 1907); Bulletin (December 31, 1914), Bureau of Chemistry;—U. S. Department of Agriculture. . . .

It is further urged that the enactment, as construed, contains an unconstitutional discrimination against the plaintiff in error, but in this aspect, again, the question is whether the classification made by the legislature can be said to be without any reasonable basis. The legislature is entitled to estimate degrees of evil and to adjust its legislation according to the exigency found to exist. And, applying familiar principle, it cannot be said that the legislature exceeded the bounds of reasonable discretion in classification when it enacted the prohibition in question relating to foods and compounds sold as food preservatives.

In several other opinions of notable fidelity to the actual conditions under which administrative problems of State regulation are encountered, Justice Hughes strongly sustained the State power. In *Savage* against *Jones*,[1] the Court was asked to condemn an Indiana statute which regulated in certain respects, the sale of what is known as "concentrated commercial food" for live-stock, and required disclosure of the ingredients and the minimum percentage of fats and proteins therein, disclosure of the formula of their combination not being required. Justice Hughes held, for a unanimous Court,

[1] 225 U. S. Reports, page 501.

that in view of the conditions under which these prepared foods for live-stock are sold and used and the importance to scientific and successful dairying that the ingredients of these concentrated foods should be known, the statute must be regarded as within the limits of what the State might reasonably do, along the lines of police regulation for the suitable protection of the best interests of its farmers. He said that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business"; and that a State enactment of this kind could not be regarded as an interference with or a burden upon interstate commerce, even as to a vendor of these stock foods who lived in another State and shipped them into Indiana for sale. He likewise held that as long as the Federal Food and Drugs Act does not require disclosure of the ingredients of any compounds, the field in that respect is left open to the discretion of the State authorities. Later in the same month, Justice Hughes wrote for the Court in the case of *Standard Stock Food Company* against *Wright*,[1] and upheld the constitutionality of a similar statute passed by the Iowa Legislature.

In *Purity Extract Company* against *Lynch*,[2] decided in December of 1912, the Supreme Court passed upon a number of questions

[1] 225 U. S. Reports, page 540.
[2] 226 U. S. Reports, page 192.

closely related to those already considered under this chapter, and also having a bearing upon the scope of the regulative power of the State to make effective its duly determined policy as to the sale and use of intoxicating liquors. The plaintiff in the action was the manufacturer of a beverage known as "Poinsetta," which contained 5.73% of malt and concededly was not intoxicating. The United States Government did not class "Poinsetta" as an intoxicating liquor, and the beverage was bottled in such a way that concededly it could not be used "as a subterfuge for the sale of beer." The defendant was to have had the exclusive agency for the beverage in one of the Mississippi counties, and was to pay an agreed price for the agency. When he went into the State, he found that the legislature, in pursuance of the "prohibition" policy of the commonwealth, had enacted a law prohibiting the sale of all malt liquors, whether intoxicating in fact or not, and the Supreme Court of the State had specifically held that this statute prohibited the sale of "Poinsetta" within the State, because one of its ingredients was malt. The defendant then refused to take the agency or pay the price; the company sued him for the money; the State Court said he need not pay it because the contract called for the doing of a thing illegal in the State; and the company asked the Supreme Court of the United States to rule that the State had no right to exclude "Poin-

setta" from the channels of interstate commerce and no right to vitiate an otherwise valid contract merely because it related to transactions for the sale of a non-intoxicating malt liquor.

On the question whether the prohibition law of the State could be made applicable to a malt beverage not intoxicating and a prohibition consequently placed on the sale of a beverage such as "Poinsetta," Justice Hughes said:

That the State in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. It is also well established that, when a State exercising its recognised authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government. . . . With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system. . . .

It was competent for the legislature of Mississippi to recognise the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of "Malt liquors." In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavour to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise. The statute establishes its own category. The question in this court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles of transactions may be found within the prescribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.

That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other States and the decision of the courts in its construction. . . . We cannot say that there is no basis for this widespread conviction.

The State, within the limits we have stated,

must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power.

CHAPTER V

THE EIGHT-HOUR WORK-DAY AND COMPENSATION FOR OCCUPATIONAL DISABILITIES THROUGH TRADE RISKS.

"The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends," was an expression of the economic and legal doctrine held by Justice Hughes in *Baltimore & Ohio Railroad Company* against the *Interstate Commerce Commission.*[1] He added that "in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution." In the so-called "Oregon hours of labour" case,[2] decided before Justice Hughes became a member of the Supreme Court, that tribunal had upheld an Oregon statute, which reduced the maximum hours of labour for women in industrial establishments to ten hours per day. In the so-called "Ohio hours of labour" case,[3] he joined with his colleagues in unanimously sustaining the Ohio statute which limited the hours of labour of

[1] 221 U. S. Reports, page 612.
[2] *Muller* vs. *Oregon* (208 U. S. Reports, page 412).
[3] *Hawley* vs. *Walker* (232 U. S. Reports, page 718).

women in certain industrial establishments to fifty-four hours in any one week. In *Miller* against *Wilson*,[1] Justice Hughes wrote the opinion of the Supreme Court, in which he held that while a limitation of the hours of women "might be pushed to a wholly indefensible extreme," there was no reason for the conclusion "that the limit of the reasonable exertion of protective authority has been overstepped" in a California statute which prescribed for employed women a maximum work-day of eight hours and a maximum work-week of forty-eight hours.

In the *Baltimore & Ohio* case above referred to, where a limitation of the hours of labour of railroad employés was under attack, Justice Hughes said, for a unanimous Court:

> The fundamental question here is whether a restriction upon the hours of labour of employés who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorised legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasised in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employés

[1] 236 U. S. Reports, page 373.

and travellers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavour to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train despatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labour of employés engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations. . . .

Finding that the objections to the validity of the statute are not well taken, we are brought to the question whether the Interstate Commerce Commission has authority to require the reports called for by its order. Section 4 of the act provides: "SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act."

The Commission then may call to its aid in the enforcement of the act "all powers granted" to it. And, although there might have been doubt as to the adequacy of the authority

of the Commission, under the law as it formerly stood, to require these reports, there can be none now in view of the amendment of § 20 of the act to regulate commerce by the act of June 18, 1910. . . .

To enable the Commission properly to perform its duty to enforce the law, it is necessary that it should have full information as to the hours of service exacted of the employés who are subject to the provisions of the statute, and the requirements to which we have referred are appropriate for that purpose and are comprehended within the power of the Commission.

There is the final objection that to compel the disclosure by these reports of violations of the law is contrary to the Fourth and Fifth Amendments of the Constitution of the United States. The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The Fourth Amendment has no application.

Justice Hughes likewise joined in the opinion of Justice Holmes in *Missouri, K. & T. Railway Company* against the *United States,*[1] in which the latter said that "as towards the public every overworked man presents a distinct danger," and he joined in Justice Harlan's holding in *Chicago, R. I. & P. Railway Company* against *Arkansas* [2] that the "full crew law" was not an obstruction to or burden upon interstate com-

[1] 231 U. S. Reports, page 118.
[2] 219 U. S. Reports, page 453.

merce, but an aid thereto, fully within the regulative power of the State.

In *Sturges & Burn* against *Beauchamp*,[1] Justice Hughes was called upon to write the opinion of the Court as to the Illinois statute prohibiting the employment of children under sixteen years of age in industrial employments. Said his opinion:

It cannot be doubted that the State was entitled to prohibit the employment of persons of tender years in dangerous occupations. . . . It is urged that the plaintiff in error was not permitted to defend upon the ground that it acted in good faith relying upon the representation made by Beauchamp that he was over sixteen. It is said that, being over fourteen, he at least had attained the age at which he should have been treated as responsible for his statements. But, as it was competent for the State in securing the safety of the young to prohibit such employment altogether, it could select means appropriate to make its prohibition effective and could compel employers, at their peril, to ascertain whether those they employed were in fact under the age specified. The imposition of absolute requirements of this sort is a familiar exercise of the protective power of government. . . . And where, as here, such legislation has reasonable relation to a purpose which the State was entitled to effect, it is not open to constitutional objection as a deprivation of liberty or property without due process of law.

[1] 231 U. S. Reports, page 320.

As Governor of New York, Mr. Hughes had been a pioneer in constructive steps for the development of an adequate and scientific system of compensation to injured employés for those disabilities which are a natural risk and concomitant of industry. As far back as 1909, two years before the enactment of the Wisconsin workmen's compensation law, Governor Hughes had sent to the New York Legislature the following recommendation, upon which the Legislature acted in authorising the creation of the so-called Wainwright Commission:

I recommend that provision be made for special and expert inquiry into the questions relating to employers' liability and compensation for workmen's injuries. Our present methods are wasteful and result in injustice. Numbers of negligence cases are prosecuted upon a basis which gives the attorney a high percentage of recoveries. Only a small percentage of the premiums paid for insurance against liability is devoted to payment of losses. As a result the workmen do not receive proper compensation and employers pay large amounts that do not reach them. There are constitutional restrictions which stand in the way of some of the remedies which have been devised in other countries; but the subject should be thoroughly examined to the end that the present waste and injustice should be mitigated to the fullest extent that may be found to be at once practicable and consistent with the provisions of our fundamental law.

Upon the recommendation of the Wainwright Commission, the Legislature passed a workmen's compensation law which was a pioneer of its kind and performed a valuable experimental service in clarifying the fundamental law as to the policy and scope of legislation in this field. In approving the Wainwright bill, which was afterwards held unconstitutional by the New York Court of Appeals in the well-known *Ives* case,[1] thereby clearing the way for a needed amendment of the State Constitution and the passage of a more comprehensive and admirable Compensation Act, Governor Hughes said:

Existing conditions with regard to employers' liability and compensation for workmen's injuries are so unjust that there should be remedial action. . . . The present methods are satisfactory neither to employer nor employed and the rules of law governing legal liability offend the commonsense of fairness. The importance of providing a suitable scheme of compensation for industrial acidents and of avoiding the shocking waste of injustice of our present methods must be conceded by all open-minded students of industrial conditions. It is difficult to devise any method of compensation which will not be visited with severe criticism and a satisfactory solution of the problem can only be reached by experimentation.

[1] *Ives* vs. *South Buffalo Ry. Co.* (201 N. Y. Reports, page 271).

In the field of indemnity or recovery for industrial accidents, Justice Hughes' opinions in the Supreme Court manifest a broad and sympathetic outlook upon the activities of the State legislatures. In *Chicago, B. & Q. Railway Company* against *McGuire,*[1] argued a few months after Justice Hughes went upon the bench, he held that the Iowa Legislature had the right to prohibit contracts between railway companies and their employés limiting the latter's right to recover damages at common law for injuries in the course of employment, and that this prohibition might be made effective against even a so-called "relief plan," to which both the company and the employés contributed, and which was by its terms supposed to bar and be in substitution for any recovery by the employé through action at law. To a very similar effect was his ruling in *Philadelphia, B. & W. Railway Company* against *Schubert,*[2] where the prohibition against exemptions from liability was contained in the Federal Employers' Liability Act of 1908. He joined repeatedly in upholding the constitutionality of State statutes [3] abrogating or modifying the "fellow-

[1] 219 U. S. Reports, page 549.

[2] 224 U. S. Reports, page 603.

[3] *Mobile, etc., R. R. Co.* vs. *Turnipseed* (219 U. S. 35), upholding the Mississippi statute in 1910; *Chicago, B. & I. R. R. Co.* vs. *McGuire* (219 U. S. 549), upholding the Iowa statute in 1911; and *Aluminum Co.* vs. *Ramsey* (222 U. S. 251), upholding the Arkansas statute in 1911.

servant doctrine''—the outgrown concept that an injured employé was barred of recovery if the accident was due to the fault of a fellow employé.

CHAPTER VI

"THE PAPER-BOX FACTORY GIRL AND THE CONSTITUTION"

The greatest Court in the world is a very human institution. It deals with palpitating human issues in a very direct, common-sense, human way, and it knows it is dealing with them—dealing with them finally, at least so far as the rights and happiness of the human beings before the Court in the particular case are concerned. Those who think of the Supreme Court as an impersonal aggregation of men with mechanical minds, leading a cloistered life and indifferent to the happenings and welfare of a workaday world, have never sat in that court-room and watched the way in which these nine black-robed men address themselves to the human as well as the legal phases of the cases argued before them, after they have come across the Capitol corridors at noon in impressive file, between ropes of red plush temporarily extended from their robing-rooms to give them avenue. The members of this Court realise what governments, Constitutions, laws, decisions, precedents, courts, law-suits, appeals, arguments, are all about and what in the final

analysis these man-created instrumentalities are and should serve, and they appear to work decidedly hard to keep all these instrumentalities in accord and in service for the ultimate welfare of the men and women who make up, and in the years to come will make up, the Nation.

In the *Survey* magazine,[1] Miss Mary Chamberlain once wrote down very vividly her impressions of the direct and open-minded way in which the Supreme Court hears argument on vital issues of human rights and "keeps its eyes on the main issue":

"OYEZ, OYEZ, OYEZ . . . God save the United States and this honourable court," chants the marshal of the highest tribunal in America as the black-robed justices file to their places.

"Save, also," he might add, "the nine million working women who to-day are pleading for health and energy, for some joyousness in living and for the welfare of their children."

For this afternoon, December 17, 1914, the first case involving the constitutionality of a law to provide minimum wages for women in industry and upheld by unanimous bench in the Supreme Court of Oregon is come to trial before the Supreme Court of the United States. On the court's decision will probably depend

[1] Issue of December 26, 1914. "The Paper-Box Factory Girl and the Constitution," by Miss Mary Chamberlain.

the status of similar laws in California, Colorado, Minnesota, Utah, Washington and Wisconsin. It will constitute, furthermore, an impetus or a blockage to the present investigations of living conditions in the States where wage legislation is contemplated.

The decision to be rendered, therefore, in the cases of *Frank C. Stettler,* a box manufacturer, of Portland, Ore., and Elmira Simpson, a girl employed in the Stettler factory, vs. the *Industrial Welfare Commission of Oregon* [1] involves more than the right of a single manufacturer to bargain for labour at six and seven dollars a week and more than the right of a single woman to scrimp through life on an eight-dollar wage. The judgment handed down may prove an index to the attitude of our final judiciary toward a broader extension of the police power of the State in the field of economic relations.

The scene in the semi-circular court-room has a touch of irony, almost of the dramatic;—the quiet, stately room so far from the whir of machines and the rush of Christmas shopping; the formality of the proceedings; the inscrutable faces of the eight judges; the attempt of . . . counsel for the plaintiffs, to prove the collapse of constitutional government by the payment of sixty-four cents more a week to a factory girl in Portland; and finally the earnest appeal of Louis D. Brandeis and Attorney General Crawford of Oregon, representing the defendants, to judge not hypothetical bogies, but

[1] No decision of the Supreme Court in this case had been handed down, up to the time of Justice Hughes' resignation from the bench.

the very real terrors of starvation, thin clothing and temptation.

The plaintiffs rest their case upon the same familiar premise—the premise of freedom of contract guaranteed by the Fourteenth Amendment to the Constitution. This arbitrary regulation of wages, regardless both of the employés' efficiency or other sources of income and of the employers' ability to pay the rate, is claimed to be a deprivation of liberty and of property (since labour is a commodity) without due process of law. Furthermore, it is branded discriminatory, on the one hand, against the employers of Oregon who must compete with manufacturers in Washington and neighbouring States; on the other hand, against employés as women.

In judging the case the Supreme Court of Oregon held that regulation of wages by a minimum wage law was a proper exercise of the police power of the State whereby "freedom" is subject to such restraint of action as the State may impose for protection of health, safety, morals, and general welfare. But Mr. Brown contends that a "fair, reasonable, necessary exercise of police power" has never been and may not be invoked to supply an individual's needs which are merely *incidental* to employment and do not, like the hazards of long hours and accidents, arise *out of* an occupation. It is difficult to follow from the argument which he advances how an individual's private life, her unmet needs of food and shoes and recreation, has no connection with the six or eight dollar wage paid for her industrial life.

To take from those who have, simply because they have, and give to those who have not, simply because they have not, warns counsel, opens a realm of police power regulation which has no limit, one which will lead to compulsory division of profit and thence to a division of property. It may be, he admits, ethically right and even economically sound, but it is impossible under our present form of government. It strains all police power and "jumps over a chasm into a field repugnant to a Constitution which holds sacred the rights of property"—the similes of his conclusion are jumbled but they express to Mr. Brown's mind the vague, nameless terrors which menace a government where a minimum wage is law.

The spectator unconsciously tries to sense the attitude of the court from the queries which the judges make. Is Mr. Justice Pitney adverse when he questions the granting of a fixed wage without reference to efficiency or Mr. Chief Justice White when he asks if such a regulation would not drive some employers out of business? May the defence expect agreement from Mr. Justice McKenna who appears to take issue when Mr. Brown declares there is no "reasonableness" in the Oregon statute? Or from Mr. Justice Holmes when he cites the degeneracy of the working classes in England before the factory acts curbed absolute "freedom of contract"? Or are these questions and comments merely the expression of alert and open minds desirous of examining the subject from its every angle?

"Never," declares a frequent visitor to the

court, "have I seen the judges more obviously interested in a case."

But whether we count them favourable or adverse, one question remains unanswered by the plaintiffs which must be answered by the court.

Ex-Senator Fulton is summing up the case of the plaintiffs. Mr. Justice Hughes, silent until now, leans forward.

"Do you base your argument on the theory of freedom of contract?" he asks.

"Yes," answers the counsel.

"Then," continues Justice Hughes, "is there not a precedent in the Ohio case [1] in which this court held constitutional the 54-hour for women in industry?"

"No," objects Mr. Fulton, "there is a difference between hours and wages."

"What is it?"

"Long hours," he repeats, "break down women so that they become public charges, it is a condition growing *out of* employment. The amount of wages has no relation to health and morals."

"But," contends Justice Hughes, "suppose it has, suppose this court finds that these evils *are* in consequence of wages paid in employment?"

And it is upon this question that the defendants, the Industrial Welfare Commission, submit most telling evidence.

Their defence is not based on contemplation of a nation shattered by the payment of minimum wage, but on a condition of industry which actually exists when wages are paid women "in-

[1] *Hawley* vs. *Walker* (232 U. S. Reports, page 718).

adequate to supply the necessary cost of living and to maintain them in health."

Mr. Brandeis does not present to the court speculation, but facts, human documents collected in a brief which was prepared in cooperation with Josephine Goldmark of the National Consumers' League; and deductions drawn from those facts.

First of all the counsel pictures the conditions found in Oregon by the Industrial Welfare Commission and confirmed by investigation in other States—that working women do not buy enough to eat in order that they may dress decently, that those who do eat plenty go without proper clothes or shelter, that those who have all these things often have them at the expense of morality.

He argues that a survey of the four remedies for such evils proves the voluntary remedies of education and organisation too slow to prevent the spread of misery; the Massachusetts plan of raising wages by compulsory publicity uncertain and unsuited perhaps to Oregon; the legal minimum wage now on trial a remedy founded on precedent and on logic. After eighteen years of minimum wage legislation in Victoria, prosperity, not chaos, is found in that commonwealth, and in England wages boards established in four trades in 1909 have been extended to four more in 1913 without destruction to the empire.

Nor, Mr. Brandeis continues, in the United States with its constitutional government is this process of restricting individual liberty so revolutionary. Factory acts, applying first to chil-

dren, have been extended to women, regulating hours of work, lunch-hour period, night work, etc., and then to men, regulating their employment in trades hazardous to life and limb, trades dangerous to health, and finally the sanitary conditions in all trades. Freedom of contract is an empty phrase, avows Mr. Brandeis, when it implies a single woman pitted against a corporation, and the laws of supply and demand, like all natural laws, must be regulated.

His final appeal is for a broader interpretation of the Constitution. It lies within the Constitution to save our people, he declares, or it must go as a hindrance to progress. It is most conservative, in the true sense of the word, to encourage experiment.

These two arguments before the Supreme Court bear in upon the spectators as more than the case for and against the minimum wage. They reflect two attitudes toward a document drawn up when society and business were organised on a scale unrecognisable in the huge operations and tense competition of to-day. One would attempt to fit the infinite march of events and economic and social change to a finite, rigid mould of constitutional language; the other would adapt its principles to a changed state of society where freedom of contract is impaired and legal protection in contract more and more necessary. They lay before the Supreme Court the clash between "that sacredness of private property," the very bulwark of our Constitution according to the plaintiffs—and the sacredness of human life, to the

defence, the real meaning of constitutional government.

In this graphic narrative of the broad and sympathetic manner in which great issues of human welfare and economic readjustment are heard by the Nation's highest Court, Miss Chamberlain depicts Justice Hughes as centering the issue with unerring accuracy on what the lawyers call the very "nub" of the question which will go hurtling through the years, no matter what in the particular case may be the decision of the Court:

> *If, as the courts have held, the legislatures may wholesomely limit the hours which women may be required to work in industrial employments, for reasons having in view, not merely the health and welfare of women, but the welfare and protection of all humankind, what shall be the metes and bounds of protective legislation, if legislatures and courts find that the minimum of the wages paid to women in industry has in fact a no less vital and causal relation to conditions similar to those against which the hours-of-labor statutes are aimed?*

"Suppose," as Justice Hughes in effect inquired; "suppose the amount of wages *has* a relation to health and morals; suppose this Court finds that these evils *are* in consequence

of wages paid in employment? *Is* there not a precedent in the Ohio case [1] in which this Court held constitutional the fifty-four hour for women in industry," and also, it may be added, in the California case,[2] in which, in the very month following this colloquy, Mr. Justice Hughes held constitutional a limitation of women's work-day to eight hours and their work-week to forty-eight hours?

[1] *Hawley* vs. *Walker* (232 U. S. Reports, page 718).
[2] *Miller* vs. *Wilson* (236 U. S. Reports, page 373).

CHAPTER VII

COMPELLING CHOICE BETWEEN WITHDRAWAL FROM TRADES-UNION MEMBERSHIP AND DISCHARGE FROM EMPLOYMENT

Several years before Governor Hughes became Justice Hughes, the Supreme Court had held that, even as it was the constitutional right of an employé to join or refrain from joining a trades-union and the constitutional right of the employer to hire or refrain from hiring union or non-union workmen, so it was the constitutional right of a union employé to quit the service of an employer who hired non-union men and the right of the employer to discharge an employé because of the latter's membership or non-membership in a trades-union. In the *Adair* case,[1] it was ruled that the constitutional guaranties of freedom of contract render invalid a Congressional statute by which it was sought to make it a crime against the United States for an interstate carrier to discharge an employé because of his membership in a labour organisation.

In 1914, the question arose as to the validity

[1] *Adair* vs. *U. S.* (208 U. S. Reports, page 161).

of a Kansas statute, of a kind already held invalid by the New York Court of Appeals,[1] whereby it was made a misdemeanour for any employer "to coerce, require, demand or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labour organisation or association, as a condition of such person or persons securing employment or continuing in the employment of" such employer. The majority of the Supreme Court thought that this statute was unconstitutional.[2] They urged that the invalidity of this enactment was an inevitable corollary of the decision in the *Adair* case. As they saw it:

Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will.

As in the *Adair* case, the majority looked upon the right to labour, and the right to make contracts respecting employment, as property rights. Labour was viewed essentially as a "commodity," just as any of its products in

[1] *People* vs. *Marcus* (185 N. Y. Reports, page 257).
[2] *Coppage* vs. *Kansas* (236 U. S. Reports, page 1).

the market, and the right to work and gain a livelihood therein was looked upon as a property right, standing in an economic and legal relation not distinguishable from that of ordinary articles of commerce. The majority said:

Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labour and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established Constitutional sense.

The prevailing opinion denied that it was within the power of the State to declare that "Coppage, the plaintiff in error, is a criminal punishable with fine or imprisonment under this statute simply and merely because, while acting as the representative of the Railroad Company and dealing with Hedges, an employé at will and a man of full age and understanding, subject to no restraint or disability, Coppage insisted that Hedges should freely choose whether he would leave the employ of the Company or would agree to refrain from association with the union while so employed."

What Justice Hughes thought of the *Adair* case and what he would have done and said had

he been a member of the Court at the time it was decided, has never been disclosed; but he at least did not think well of a probably logical extension of its doctrine to the *Coppage* case, and was unable to give assent to the proposition that the legislature of a State might not, in its discretion, forbid an employer to require an employé to agree affirmatively not to join or become or remain a member of a trades-union during the period of his employment, as a condition of such person being permitted to become or remain an employé of the employer insisting upon such a condition precedent of employment.

Justice Holmes dissented from the majority ruling, in a compact memorandum which reiterated the views many times expressed by him, in the Supreme Court and in the Massachusetts court. Justice Day and Justice Hughes likewise dissented, and the former prepared a memorandum [1] which expressed the views in which the latter concurred. Justice Day and Justice Hughes were unable to indorse the majority conclusion that a right to require any such agreement from trades-union employés, even on penalty of discharge or refusal to hire, was essential to the assured mutual freedom of contract on the part of both employer and employed. They contended that inasmuch as men had the right to choose freely whether they would join trades-unions and inasmuch as the

[1] *Coppage* vs. *Kansas* (236 U. S., page 27).

law looks with favour upon membership in such organisations for common industrial betterment, the Legislature of Kansas had the right to forbid attempts to coerce an unwilling employé to agree to forego the exercise of his wholesome legal right of membership, even to the point of refusing him employment or continued employment at all unless he was willing thus to agree not to do what he lawfully and desirably might do, in the exercise of his supposedly assured rights.

The reasoning of the opinion concurred in by Justice Hughes is interesting, as expressive of a broad and modern outlook upon industrial relationships:

That the right of contract is a part of individual freedom within the protection of this (Fourteenth) amendment, and may not be arbitrarily interfered with, is conceded. While this is true, nothing is better settled by the repeated decisions of this court than that the right of contract is not absolute and unyielding, but is subject to limitation and restraint in the interest of the public health, safety and welfare, and such limitations may be declared in legislation of the State. . . . Whether a given exercise of such authority transcends the limits of legislative authority must be determined in each case as it arises. The preservation of the police power of the States, under the authority of which that great mass of legislation has been enacted which has for its purpose the promotion of the health, safety and welfare of

the public, is of the utmost importance. . . .

Of the necessity of such legislation, the local legislature is itself the judge, and its enactments are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary and capricious, and hence out of place in a government of laws and not of men, and irreconcilable with the conception of due process of law. . . . By this it is not meant that the legislative power is beyond judicial review. Such enactments as are arbitrary or unreasonable and thus exceed the exercise of legislative authority in good faith, may be declared invalid when brought in review by proper judicial proceedings. This is necessary to the assertion and maintenance of the supremacy of the Constitution. . . .

The question now presented is, May an employer, as a condition of present or future employment, require an employé to agree that he will not exercise the privilege of becoming a member of a labour union, should he see fit to do so? In my opinion, the cases are entirely different, and the decision of the questions controlled by different principles. The right to join labour unions is undisputed, and has been the subject of frequent affirmation in judicial opinions. Acting within their legal rights, such associations are as legitimate as any organisation of citizens formed to promote their common interest. They are organised under the laws of many States, by virtue of express statutes passed for that purpose, and, being legal,

and acting within their constitutional rights, the right to join them, as against coercive action to the contrary, may be the legitimate subject of protection in the exercise of the police authority of the States. This statute, passed in the exercise of that particular authority called the police power, the limitations of which no court has yet undertaken precisely to define, has for its avowed purpose the protection of the exercise of a legal right, by preventing an employer from depriving the employé of it as a condition of obtaining employment. I see no reason why a State may not, if it chooses, protect this right, as well as other legal rights. . . .

It is urged that a labour organisation—a voluntary association of working-men—has the constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men. And it is asserted that there cannot be one rule of liberty for the labour organisation and its members and a different and more restrictive rule for employers. . . . An analogous case, viewed from the employer's standpoint, would be: Can the State, in the exercise of its legislative power, reach concerted effort of employés intended to coerce the employer as a condition of hiring labour that he shall engage in writing to give up his privilege of association with other employers in legal organisations, corporate or otherwise, having for their object a united effort to promote by legal means that which employers believe to be for the best interest of their business? . . .

I entirely agree that there should be the same rule for employers and employed, and the same liberty of action for each. In my judgment, the law may prohibit coercive attempts, such as are here involved, to deprive either of the free right of exercising privileges which are theirs within the law. . . . The penalty imposed is not for the discharge but for the attempt to coerce an unwilling employé to agree to forego the exercise of the legal right involved as a condition of employment. It is the requirement of such agreements which the State declares to be against public policy.

I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employé as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employé as it is to guard that of the employer. A principal object of this statute is to protect the liberty of the citizen to make such lawful affiliations as he may desire with organisations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.

Out of the atmosphere, and with the advantage of a leisurely examination of both opinions, the minority declaration does not seem a notably cordial acclaim and acceptance of the doctrine or the holding of the *Adair* case.

CHAPTER VIII

THE RIGHTS AND INDUSTRIAL STATUS OF WOMEN

Justice Hughes had been on the bench about two weeks when there was presented a vital question as to property rights of married women, at common law and under the enlightened statutes which have in recent years been passed as steps towards emancipating the wife from the common-law concept of the merger of her legal existence in that of her husband. The question was, in substance, whether in the District of Columbia, under the statute passed by Congress in 1901, a married woman was empowered, not only to sue others in her own right for redress for wrongs done to her person or her property, but also to maintain an action against the man to whom she was still joined in marital bond, to recover damages for an assault and battery committed by him against her.

The wife who sought to sue her well-to-do spouse was named Thompson. She charged that she had been brutally beaten on seven different days, separated in point of time. On four of these occasions on which she was the victim of force and violence, she said that she

was *enceinte* and that her husband knew it when he added force to wrath against her. The items of her complaint indicated that she was seriously injured, and she asked damages in the sum of $70,000, which she thought her erring spouse could well afford to pay. She sought to sue in her own name and in her own right, to recover damages as any other person could, compensatory of physical injuries inflicted upon her. The District of Columbia Courts ruled that she could not sue at all, and her attorneys carried the matter to the Supreme Court, which is the court of final appeal for the District of Columbia, regardless whether an otherwise "Federal question" is involved in the case appealed.

Upon the question of the construction of this statute and the rights of women thereunder, Justice Hughes found himself for the first time at variance with a large majority of his colleagues. They agreed with the District Court, and he therefore felt compelled to register his earnest dissent from the decision of the Court. Justice Day delivered the opinion which set forth the prevailing view. The statute under construction provided that

> Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security or protection of their

property, *and for torts committed against them, as fully and freely as if they were unmarried. . . .*

The majority of the Court held,[1] in effect, that the portions of the statute italicised above should be read and taken in connection with the preceding clause which authorised separate suit "for the recovery, security or protection of their property." From this the conclusion was reached that, as to a married woman, "the limitation upon her right of action imposed in the requirement of the common law that the husband should join her (in any suit) was removed by the statute, and she was permitted to recover separately for such torts (committed by others), as freely as if she were still unmarried. The statute was not intended to give a right of action as against the husband. . . . In no act (of legislation) called to our attention has the right of the wife been carried to the extent of opening the Courts to complaints of the character of the one here involved."

This view of the statute, argued with great elaboration of reasoning as to the historical perspective and the legislative intent, the new Justice was unable to adopt. He felt the statute fairly meant what it said; he found his divergence of belief also shared by two veterans of the Court; and he joined with Justice Holmes in concurring in a trenchant opinion of

[1] *Thompson* vs. *Thompson* (218 U. S. Reports, page 611).

dissent, read by Justice Harlan, in part as follows:

In my opinion these statutory provisions, properly construed, embrace such a case as the present one. If the words used by Congress lead to such a result, and if, as suggested, that result be undesirable on grounds of public policy, it is not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly-expressed will of the legislative department. With the mere policy, expediency or justice of legislation the courts, in our system of government, have no rightful concern. Their duty is only to declare what the law is, not what, in their judgment, it ought to be—leaving the responsibility for legislation where it exclusively belongs, that is, with the legislative department, so long as it keeps within constitutional limits. Now, there is not here, as I think, any room whatever for mere construction—so explicit are the words of Congress. Let us follow the clauses of the statute in their order. The statute enables the married woman to take, as her own, property of any kind, no matter how acquired by her, as well as the avails of her skill, labour or personal exertions, "as absolutely *as if she were unmarried.*" It then confers upon married women the power to engage in any business, no matter what, and to enter into contracts, whether engaged in business or not, and to sue separately upon those contracts. If the statute stopped here, there would be ground for holding that

it did not authorise this suit. But the statute goes much further. It proceeds to authorise married women "also" to sue separately for the recovery, security and protection of their property; still more, they may sue, separately, "for *torts* committed against *them* as fully and freely *as if they were unmarried.*" No discrimination is made, in either case, between the persons charged with committing the tort. No exception is made in reference to the husband, if he happens to be the party charged with transgressing the rights conferred upon the wife by the statute. In other words, Congress, by these statutory provisions, destroys the unity of the marriage association as it had previously existed. It makes a radical change in the relations of man and wife as those relations were at common law in this District. In respect of business and property the married woman is given absolute control; in respect of the recovery, security and protection of her property, she may sue, separately, in *tort,* as if she was unmarried; and in respect of herself, that is, of her person, she may sue, separately, as fully and freely as if she were unmarried, "for *torts* committed *against her.*" So the statute expressly reads.

But my brethren think that notwithstanding the destruction by the statute of the unity of the married relation, it could not have been intended to open the doors of the courts to accusations of all sorts by husband and wife against each other; and, therefore, they are moved to add, by construction, to the provision that married women may "sue separately . . . for

torts committed against them as fully and freely as if they were unmarried" these words: "Provided, however, that the wife shall *not* be entitled, in any case, to sue her husband separately for a tort committed *against her person.*" If the husband violently takes possession of his wife's property and withholds it from her she may, *under the statute,* sue him, separately, for its recovery. But such a civil action will be one in tort. If he injures or destroys her property she may, *under the statute,* sue him, separately, for damages. That action would also be one in tort. If these propositions are disputed, what becomes of the words in the statute to the effect that she may "sue separately for the recovery, security and protection" of her property? But if they are conceded—as I think they must be—then Congress, under the construction now placed by the court on the statute, is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person. I will not assume that Congress intended to bring about any such result. I cannot believe that it intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the detention, of her property, and at the same time denying her the right to sue him, separately, for a tort committed against her person.

I repeat that with the policy, wisdom or justice of the legislation in question this court can

have no rightful concern. It must take the law as it has been established by competent legislative authority. It cannot, in any legal sense, make law, but only declare what the law is, as established by competent authority.

My brethren feel constrained to say that the present case illustrates the attempt, often made, to effect radical changes in the common law by mere construction. On the contrary, the judgment just rendered will have, as I think, the effect to defeat the clearly expressed will of the legislature by a construction of its words that cannot be reconciled with their ordinary meaning.

A year later there was before the Supreme Court another cause which had important bearing upon the validity of modern legislation for the better safeguarding of the status of the wife under the marital contract, so far as the earnings and property of the husband are concerned. The Massachusetts Legislature had enacted elaborate provisions as to the assignment by wage-earners of their future earnings. Among other things, it was required that if the employé were a married man, the written consent of his wife must be attached to the written instrument of assignment. The Massachusetts Supreme Judicial Court had "justified the partial restriction of the statute on the ground that the extravagance or improvidence of the wage-earner might tempt to the disposition of wages to be earned, and he and his family, deprived

of the means of support, might become a public charge. It was pointed out besides that his needs might be taken advantage of by the unscrupulous. . . . The Court found more difficulty with the provision which requires the consent of the wage-earner's wife to the assignment, but justified it on the general considerations we have mentioned, and on the ground of her interest in the right use of his wages, though she have no legal title in them."

In sustaining the statute, the Supreme Court of the United States continued by saying,[1] in an opinion concurred in by Justice Hughes and all his colleagues:

We cannot say, therefore, that the statute as a police regulation is arbitrary and unreasonable and not designed to accomplish a legitimate public purpose.

Elsewhere in the same opinion, the Supreme Court, brought face to face with traditional rules which take no account of the dawning of a new day in the concept of property rights under the contract of marital partnership, said:

Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it.

Basic questions as to the industrial status of women and the power of the State to protect

[1] *Mutual Loan Co.* vs. *Martell* (222 U. S. Reports, page 225).

itself by intervening to protect them, were passed upon by Justice Hughes in the case of *Miller* against *Wilson*[1] and in *Bosley* against *McLaughlin*,[2] both of which were argued before the Supreme Court by Louis D. Brandeis, appearing in behalf of the constitutionality of the California statutes under review. In the *Miller* case, a hotel proprietor had been arrested for requiring a chambermaid to work in his hotel for nine hours a day, in violation of the provision of law which prohibited the employment of any woman "in any manufacturing, mechanical or mercantile establishment, laundry, hotel or restaurant, or telephone or telegraph establishment or office, or by any express or transportation company in this State more than eight hours during any one day or more than forty-eight hours in one week."

Upon the vital question "whether the restrictions of the statute have a reasonable relation to a proper purpose," Mr. Justice Hughes said that "the recent decisions of this Court upholding other statutes limiting the hours of labour of women must be regarded as decisive. In *Muller* v. *Oregon* (208 U. S. Reports, page 412) . . . the decision was based upon considerations relating to woman's physical structure, her maternal functions, and the vital importance of her protection in order to preserve the strength and vigour of the race."

[1] 236 U. S. Reports, page 373.
[2] 236 U. S. Reports, page 385.

"She is properly placed in a class by herself," said the Court in the portion of the opinion in the *Muller* case quoted by Justice Hughes, "and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. . . . The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labour, are not imposed solely for her benefit, but also largely for the benefit of all."

The opinion written by Justice Hughes for a unanimous Court in the *Miller* case sustained the constitutionality of the California eight-hour work-day statute, including the power of the Legislature to make the regulation apply to certain vocations of women and not to others. In the *Bosley* case, Justice Hughes likewise wrote for a unanimous Court, and held that in view of the nature of the work done by student nurses and pharmacists in hospitals and the public importance that work of that kind should not be done by persons overfatigued, the Legislature had the right to limit their daily service to eight hours, and did not act arbitrarily or unreasonably in exempting graduate nurses from the operation of the statute, in view of the disclosed differences in the conditions under which they perform their work.

CHAPTER IX

FRANCHISE OBLIGATIONS AND VESTED RIGHTS

It was a reasonable expectation that one who in high administrative position had worked long and patiently with public utility problems in a great City and State, would bring to judicial service a broad, fair and constructive point of view as to the duration and scope of franchise grants, and as to the reciprocal rights and obligations arising under them, on the part alike of the municipality and the corporation receiving the grant. Governor Hughes went to the Supreme Court fresh from the consideration of many franchise and public service problems in New York City and State, and he brought a definite, forward-looking grasp of the legal principles which govern the vesting of franchise rights and the results which the public has the right to expect from the bestowal of privileges of user of public thoroughfares.

In *New York Electric Lines Company* against *Empire City Subway Company*,[1] decided in 1914, there was a corporate challenge of the right and power of the City of New York to re-

[1] 235 U, S. Reports, page 179.

voke, in 1906, a franchise which had been granted in 1878, for the laying of wires or other conductors of electricity in conduits under the streets. The New York Electric Lines Company did virtually nothing with the franchise —certainly nothing by way of using it or giving the public any service under it; but when the privilege had become very valuable, the company sought to assert tardily the right which it had been treating "as susceptible of practically indefinite retention unused." Justice Hughes held that the public had a right to receive beneficial results from franchise grants or terminate them; "the right conferred was to be used within a reasonable time or lost." His opinion said, in part:

It has always been recognised that, as a franchise is given in order that it may be exercised for the public benefit, the failure to exercise it as contemplated is ground for revocation or withdrawal. In the cases where the right of revocation in the absence of express condition has been denied, it will be found that there has been performance at least to some substantial extent or that the grantee is duly proceeding to perform. And when it is said that there is vested an *indefeasible* interest, easement, or contract right, it is plainly meant to refer to a franchise not only granted but exercised in conformity with the grant.

It is a tacit condition annexed to grants of franchises that they may be lost by mis-user

or non-user. . . . The conception of the permission as giving rise to a right of property in no way involves the notion that the exercise of the franchise may be held in abeyance for an indefinite time, and that the right may thus be treated as a permanent lien upon the public streets, to be enforced for the advantage of the owner at any time, however distant. Although the franchise is property, "it is subject to defeasance or forfeiture by failure to exercise it, or by subsequent abandonment after it has been exercised." If "no time is prescribed, the franchise must be exercised within a reasonable time." It follows that where the franchise has not been exercised within a reasonable time in accordance with the condition which inheres in the nature of the grant, its revocation upon this ground cannot be regarded as an impairment of contractual obligation.

In other causes, likewise, Justice Hughes revealed a broad and common-sense view as to the essential elements of an "impairment of the obligation of" a franchise contract. In *Louisiana Railway & Navigation Company* against the *City of New Orleans*,[1] he declared that "while we are to give to public grants a fair and reasonable interpretation, they are not to be extended by implication beyond their clear intent," and that "the contract on which the plaintiff relies" to sustain the claim that a subsequent repealing ordinance impaired contract

[1] 235 U. S. Reports, page 164.

rights of the company "was subject, in any aspect, to a suspensive condition, that the event in which the obligation was to arise did not happen, and hence that the subsequent enactment was not open to the objection raised." In *Missouri and Kansas Interurban Ry. Co.* against the *City of Olathe, Kansas,*[1] in view of the decision of the State Court that the company had in fact had substantially all the privileges in fact conferred by the franchise contract claimed to be "impaired," he held that no question was presented for Federal review. In *Chicago, M. & St. P. Ry Co.* against the *City of Minneapolis,*[2] a broad and practical construction was given to the obligations of the company under its franchise and the State law, as to the erection of bridges or viaducts to carry streets over tracks or tracks over streets, in connection with a new waterway being constructed for recreational purposes between two lakes in public parks. On the other hand, his solicitude for public interests led to no sanctioning of strained constructions to extort some advantage from a franchise-holding corporation. As he said in *Russell* against *Sebastian,*[3] where sections of the California Constitution and municipal ordinances of Los Angeles were under review:

The established and salutary rule is invoked that public grants are to be construed strictly

[1] 222 U. S. Reports, page 187.
[2] 232 U. S. Reports, page 430.
[3] 233 U. S. Reports, page 195.

in favour of the public; that ambiguities are to be resolved against the grantee. . . . It has often been stated, as one of the reasons for the rule, that statutes and ordinances embodying such grants are usually drawn by interested parties and that it serves to frustrate efforts through the skilful use of words to accomplish purposes which are not apparent upon the face of the enactment. . . . But it must also be recognised that this principle of construction does not deny to public offers a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey. . . . Here, the provision was presented by a constitutional convention for adoption by the people as the deliberate expression of the policy of the State in order to secure the benefits of competition in public service, and it will not be questioned that it must receive, as the State Court said in *People* v. *Stephens* (62 California Reports, page 233), "a practical, common-sense construction."

Upon no other matter did Justice Hughes find himself so often or so sharply at variance with the prevailing judgment of his gifted colleagues, as concerning assertions of the perpetual character of granted franchises and denials of the reserved power of the public to repeal, modify or revoke such grants. In *City of Owensboro* against the *Cumberland Telephone and Telegraph Company,*[1] the company said the municipality had no power to revoke

[1] 230 U. S. Reports, page 58.

the franchise granted to it by a municipal ordinance. The City replied that the franchise ordinance itself provided that "this ordinance may be altered or amended as the necessities of the City may demand," and the City, moreover, asserted that it had no possible power to grant a franchise perpetual and irrevocable, for the reason that the City Charter, under which alone the municipality had power to pass the franchise ordinance at all, provided that the Common Council should have "full power to make, publish and repeal all ordinances for the following purposes"—among others, "to regulate the streets," which included the granting of franchises to use the streets.

Five of the justices held that the provisions of the franchise ordinance as to alteration or amendment thereof did not amount to a reservation of the right to repeal the ordinance altogether, and that the provision of the City Charter as to the power of the Common Council to "repeal all ordinances" "to regulate the streets" "obviously refers to ordinances which are legislative in character, and exertions of the governmental power of the municipal council,—a power in its nature not to be abridged by irrepealable ordinances." Four of the Justices, among them Justice Hughes, dissented strongly from the majority view that the ordinance franchise was perpetual and subject to no revocation by the municipality. The minority held that "the permission to place poles and

string wires in the City of Owensboro was granted under a charter which expressly reserved the right to repeal by subsequent act of the municipal legislature. In the face of this authority and presumably with knowledge of it, the company has entered upon the streets and made use of them for the purposes intended. Holding its grant subject to the superior right of the City to end it, I think the subsequent repealing ordinance was within the power of the municipality."

In *Grand Trunk Western Railway Company* against the *City of South Bend,*[1] the municipality had granted the company a franchise to lay a double track on certain streets, and in so doing had failed to reserve specifically any right to alter or repeal the grant. After the company had built and operated the double track over a large part of the distance, the City sought to repeal the ordinance, to the extent of taking away any right to maintain more than one track over the franchise route. This action was sought on grounds of the safety and convenience of the major portion of the public, and justification was claimed under the "police power" to which every franchise is impliedly subject. The majority of the Court held that the City had the power to regulate the use of the franchise, but not to destroy it or take it away, and that the company had a vested right which the City's subsequent acts threatened to im-

[1] 227 U. S. Reports, page 544.

pair. From this view Justices Hughes and Pitney again dissented.

Upon the question of the regulative power of government to require extensions and additions to the facilities afforded by franchise-holding public utilities, Justice Hughes declared, in *Union Lime Company* against the *Chicago & Northwestern Railway Company:*[1]

It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulations of public authority. As was said by this court in *Hairston* v. *Danville & Western Ry. Co.:* "The uses for which the track was desired are none the less public because the motive which dictated its location over this particular land was to reach a

[1] 233 U. S. Reports, page 211.

private industry, or because the proprietors of that industry contributed in any way to the cost." There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. . . .

While common carriers may not be compelled to make unreasonable outlays, it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carriers' lines, thus furnished under the direction or authority of the State, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility and as such is always available as localities change and communities grow. The Supreme Court of Wisconsin has left no doubt with respect to the public obligations imposed upon the carrier in relation to the spurs and branches to be provided under the statute in question, and we find no ground for the conclusion that this enactment was beyond the State power.

CHAPTER X

PREJUDICIAL RESTRAINT OF TRADE AND THE NEED FOR CERTAINTY IN THE ANTI-TRUST ACTS

Justice Hughes went to the Supreme Court from the forum of public affairs. He had often, in public addresses, given expression to his views as to the advisable form and scope of the statutes aimed at oppressive combinations in restraint of trade, and the means of making such enactments workable, understandable, and effective. Perhaps for the reason that he had thus recently been active, in the political sphere, in the formulation of policy-determining opinion as to what the law of the subject *ought* to be, he was not, during the months first following his translation to the judicial sphere, assigned to prepare opinions of the Court on questions of what the law *was* under the enactments then in force. Upon issues of the inherent fairness and permissibleness of challenged methods of competition with trade rivals, he prepared several opinions to which reference will be made in this chapter; but upon issues involving the interpretation of the Sherman Anti-Trust Act, his participation was not reflected by the preparation of published opinions.

In 1908 he had declared [1] that "the battle for free institutions has been a struggle against special privilege." At Chicago in the same year he had said [2] that

We desire to put an end to unfair practices, unjustifiable preferences, and oppressive proceedings by which, apart from proper economic advantages or superior skill in industry, rivals are barred from equal opportunities and thrust out of the way or destroyed. . . . In a free country it is intolerable that one should be denied equal access to markets by discriminating rates or allowances, or that he should be the victim of a conspiracy to deprive him of his business, or that he should be crushed by the misuse of large aggregations of capital in unfair competition. . . . Laws, State and Federal, should be as definite as possible, and should apply with becoming precision to the practices sought to be reached. . . . It is possible and advisable in dealing with this subject that there should be a more explicit and appropriate statement than we now have in the Sherman Act; that fair agreements as to railroad rates which may receive the approval of the Interstate Commerce Commission, and that associations and agreements for reasonable and obviously proper purposes, should not be included in a sweeping condemnation; that it should point with a more definite aim at the evils which afflict inter-

[1] Address before the Republican Club of the City of New York on January 31, 1908.

[2] Address before the Union League Club of Chicago on February 22, 1908.

state commerce and for which it is in the power of Congress to provide a remedy.

The evils in question will not be eradicated by mere changes in forms of organisations. . . . The way to get rid of abuses is to attack them directly. And I believe the most efficacious means is definition and proscription, and adequate punishment of the offenders. The punishment is most salutary when visited upon the guilty individuals. Few men can be hired to go to jail.

Summoned to the Supreme Court and called on to decide what the law already was, Justice Hughes concurred in the judgment of all except Justice Harlan of his colleagues [1] that, under precedents fairly operative and upon unmistakable evidence of the intention of Congress in passing the Sherman Law, the latter could not be construed by the Court to do more than prohibit those contracts, agreements, or combinations which operate to the prejudice of public interests by unduly restricting the wholesome play of trade competition or unduly obstructing the beneficial course of trade, or which, either because of their inherent nature or effect or because of the evident purpose of the acts done, injuriously restrain the accustomed activities of trade. He joined in the conclusion that the statute as it stood "did not forbid or restrain the power to make normal and useful contracts

[1] *Standard Oil Co.* vs. *U. S.* (221 U. S. Reports, page 1); *U. S.* vs. *American Tobacco Co.* (221 U. S. Reports, page 106).

to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose" and that the words "restraint of trade" should be given a reasonable meaning and interpretation which would protect the public interests involved and "would not destroy the individual right to contract and render difficult, if not impossible, any movement of trade in the channels of interstate commerce —the free movement of which it was the purpose of the statute to protect." Justice Hughes assented likewise to the conclusion that the statute "embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed," and that "there was no possibility of frustrating that policy (of the Act) by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirections the prohibitions of the statute."

As to the historical basis for this construction of the existing statute, or as to the practicability or adequacy of the statute as thus interpreted for present-day business conditions, discussion is not within the scope of this volume. It may be sufficient to say that upon questions of the meaning and scope of the Sherman Act, Justice Hughes, with a single interesting exception, continued in accord with a majority of his colleagues and concurred in their opinions as prepared.

As an interpreter of existing law, no less than when an advocate of changes therein, he felt that there should be definiteness as well as fairness of standards, to which business men might conform the conduct of their business, and this rule of certainty in standards he applied to cases arising under the Anti-Trust Acts. In *Collins* against *Kentucky*,[1] Collins and other tobacco growers of Mason County, Kentucky, had entered into an agreement with a "tobacco pool" society authorised by the State statute, whereby they consigned to the pool their respective crops of tobacco, to be sold by the society as their agent upon such terms as it prescribed, not less than a fixed minimum. The statute forbade a person entering such a pool to dispose of his crop without the consent of the society; Collins did so and was indicted. The statute had been construed by the Kentucky courts as necessarily to be read in connection with the Anti-Trust Acts of the State, by which persons were prohibited from entering into any "pool or agreement" "to fix, control or regulate the price of any commodity or article by raising or depreciating, or attempting to raise or depreciate, it above or below its *real value.*" As to this kind of legislation and the conviction of Collins under it, Justice Hughes said:

The statute, in its reference to "real value," prescribed no standard of conduct that it was

[1] 234 U. S. Reports, page 634.

possible to know; . . . it violated the fundamental principles of justice embraced in the conception of due process of law in compelling men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable.

The Harvester Company was prosecuted [1] for being a party to a price-raising combination; Collins, for breaking a combination agreement and selling outside the pool which he had joined. With respect to each, the test of the legality of the combination was said to be whether it raised prices above the "real value." If it did—in Collins' case—he would be subject to penalties for remaining in the combination; if it did not, he would be punishable for not keeping his tobacco in the pool. He was thus bound to ascertain the "real value"; to determine his conduct not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavouring to conjecture what would be the value under other and so-called normal circumstances with fair competition, eliminating the abnormal influence of the combination itself, and of all other like combinations, and of still other combinations which these were organised to oppose. The objection that the statute, by reason of its uncertainty, was fundamentally defective, was as available to Collins as it was to the Harvester Company.

[1] *International Harvester Company* vs. *Kentucky* (234 U. S. Reports, page 216).

The instance of variance from the views of his colleagues in this branch of the law arose in one of that interesting series of cases in relation to the right of the manufacturer to fix the prices at which his product may be sold by the wholesaler, the retailer, and other vendors. In *Dr. Miles Medical Company* against *Park & Sons Company*,[1] the manufacturer of a proprietary medicine, prepared pursuant to a secret but unpatented formula and sold with distinctive labels, packages and trade-marks, sought to maintain certain prices fixed by it for all sales of its products, at either wholesale or retail. This result was accomplished through so-called "restrictive agreements." The Court held, through an opinion prepared by Justice Hughes, that both at common law and under the Sherman Act, agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void, and added:

The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce and the rules concerning the

[1] 220 U. S. Reports, page 373.

freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstances whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

In *Henry Company* against *Dick Company*,[1] however, Justice Hughes found himself in a minority of the Court, along with Chief Justice White and Justice Lamar. This case involved, not a proprietary medicine, an unpatented article, or a secret formula, but a rotary mimeograph machine covered by letters patent. Neither the patent on the machine, nor any independent patents, covered the ink, stencil paper, or other supplies used on or in connection with the mimeograph. The Dick Company, owner of the patent and manufacturer of the machine, sold one of the mimeographs to a Miss Skou. The sale was complete and unconditional; there was no condition imposed affecting

[1] 224 U. S. Reports, page 1.

the title or the uses of the machine. There was, however, upon the machine what was called a "License Restriction," which recited that the mimeograph "may be used only with the stencil paper, ink and other supplies made by the A. B. Dick Co." The Henry Company sold to Miss Skou ink which could as well be used on the Dick Company machine. The ink was not a patented article, and was not made by the Dick Company. The majority of the Court held that inasmuch as the use of the Henry ink by Miss Skou would be a use of the mimeograph by her in a prohibited way and would subject her to liability to the Dick Company for infringement of the letters-patent on the machine sold to her, the Henry Company was liable in damages to the Dick Company, on the theory that in aiding and abetting Miss Skou in violating this "license restriction" the Henry Company was itself infringing the patent on a machine which the Henry Company did not own and was not using. The majority were of the opinion that the patent laws were enacted to create the most genuine of all monopolies; that this monopoly power was granted to subserve a broad public policy; and that the patent laws should be construed and applied to give effect to what Congress has thus far regarded as a wise and beneficial purpose in the stimulation of invention.

Chief Justice White, with Justice Hughes and Justice Lamar concurring, registered a spirited protest against this departure from what they

regarded as the salutary rule laid down by Justice Hughes in the *Miles Medical Company* case. "It is not, as I understand it, denied," declared the Chief Justice, "that the particular contract which operates this result, if tested by the general law, would be void as against public policy. The contract, therefore, can only be maintained upon the assumption that the patent law and the issue of a patent is the generating source of an authority to contract to procure rights under the patent law not otherwise within that law and which could not be enjoyed under the general law of the land." The idea that the casual dealer who sold ink to a public stenographer who happened to own a Dick Company mimeograph, was infringing the patent on the *machine* in making the sale, if the dealer knew the ink was for use on the mimeograph, seemed untenable, and the empowering of the Dick Company to dictate that no ink, stencil paper, and the like, should be bought, by an owner of the Dick machine, from any one except the Dick Company, seemed subversive of public policy. Against the judicial sanction of this form of monopoly control through giving effect to the "license restriction" against the use of any incidental materials except those manufactured or sold by the manufacturer of the machine, the minority opinion is a very earnest plea.

The pendulum of decision soon swung strikingly in the other direction. The Dick Com-

pany case had been argued in October, 1911, after the death of Justice Harlan and during the absence of Justice Day. Application for re-hearing was made, in which the Attorney-General of the United States and others asked leave to intervene, but a re-hearing was denied. The following Spring the Court heard and decided the case of *Bauer & Cie* v. *O'Donnell,*[1] the so-called "Sanatogen price-cutting case." In this case it appeared that O'Donnell was proprietor of a retail drug store in Washington. He bought of the Bauer Company packages of Sanatogen, which bore the following:

Notice to Retailers. This size package is licensed by us for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent. . . . A purchase is an acceptance of this condition. . . .

O'Donnell sold these packages at retail at less than a dollar, and when the Bauer Company refused to supply him further, he bought from jobbers and went on selling at such price as he saw fit, and said he proposed to continue doing that. The Court of Appeals for the District of Columbia asked the Supreme Court whether the acts of this retail druggist constituted an infringement of the Sanatogen patent.

Justice Day had now returned to the bench, and wrote the opinion of the Court. Justice

[1] 229 U. S. Reports, page 1.

Pitney had meanwhile taken his seat as successor of Justice Harlan. Justices Lurton, McKenna, Holmes, and Van Devanter, who had constituted the majority in the Dick Company case, found themselves now in a minority. Justice Hughes, who, with Chief Justice White and Justice Lamar, had dissented from the Dick Company decision, joined with them and Justices Day and Pitney in returning a negative answer to the question certified. The Dick Company decision was now at least ostensibly explained by calling attention to the fact that "it was expressly stated in the opinion that the machine was sold at cost or less and that the patentee depended on the profit realised from the sale of the non-patented articles to be used with the machine for the profit which he expected to realise from his invention." In any event, a majority of the Court, with Justice Hughes concurring, now held that a patentee might not by notice limit the price at which retailers might make future sales of the patented article, at least as against a retailer who buys the patented article from jobbers who paid to the patentee the full wholesale price for the article sold. The Court also held that where the transfer of the patented article is full and complete, an attempted reservation of the right to fix the price at which the article itself may be sold by the vendee is not in any sense a license for qualified use by the vendee, but an attempt unduly to extend the right to vend the patented

article, and is therefore futile under the statute. The passing of the title to the purchaser was said to place the article beyond the limits of the monopoly secured by the patent laws.

Justice Hughes' outlook upon business questions brought before the Court was strikingly direct and cognate to disclosed facts. Where "there is no rule of public policy which denies effect to the expressed intention" of the parties, he declared,[1] and "the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made." "It was not the purpose or effect of the copyright law to render secure the fruits of piracy," was his concise method[2] of forestalling the claim of the proprietors of a "piratical composition" to the protection of the statute as against the rightful owners. "It cannot be supposed that Congress contemplated such a disregard of the facts of trade, and such a departure from the policy of former tariff legislation," said he,[3] "as would be involved in" such a construction of the Tariff Act as was contended for by one of the parties before the Court in a case involving the status of "drilled pearls." Recognised trade usages were given force and effect, when contravening no fundamentals of public policy. In

[1] *Santa Fe Ry. Co.* vs. *Grant Bros.* (228 U. S. Reports, page 177).

[2] *Ferris* vs. *Frohman* (223 U. S. Reports, page 424).

[3] *U. S.* vs. *Citroen* (223 U. S. Reports, page 407).

Taney against *Penn Bank,*[1] where established practices of the distillers' business were challenged, he replied:

The fundamental objection is that the custom, to which the entire trade is adjusted, is opposed to public policy. But we know of no ground for thus condemning honest transactions which grow out of the recognised necessities of a lawful business. The case is not one where credit may be assumed to be given upon the faith of the ostensible ownership of goods in the debtor's possession. Every one dealing with distillers is familiar with the established practice in accordance with which spirits are held in store, under governmental control, and are transferred by the delivery of such documents as we have here. There is no warrant for saying that the creditors are misled by delusive appearances. The usage serves a fair purpose and there is no public policy which requires that the trade should be thrown into disorder by a refusal to uphold it.

In enacting the Trade-Mark Act of 1905, "it was not the intention of Congress," as interpreted by Justice Hughes, "thus to provide for a barren notice of ineffectual claim, but to confer definite rights." In *Thaddeus Davids Company* against *Davids,*[2] the complainant commonly put its mark "DAVIDS" prominently at the top of its labels. The defendants,

[1] 232 U. S. Reports, page 174.
[2] 233 U. S. Reports, page 461.

in the same position on its labels, developed a coincident custom of placing the designation "C. I. Davids." At the bottom of their label, the defendants placed "DAVIDS MFG. CO." The use of the name in this manner seemed in fact to be a mere simulation of the complainant's mark which it had duly registered; it constituted a "colourable imitation" within the meaning of the Act. The decree of the Circuit Court accordingly restrained the defendants from the use of the words "Davids Manufacturing Company" and from the use of the word "Davids" at the top of their labels, in connection with the business of making and selling inks.

In sustaining this action of the lower Court, Justice Hughes said:

In the case, therefore, of marks consisting of names or terms having a double significance, and being susceptible of legitimate uses with respect to their primary sense, the reproduction, copy or imitation which constitutes infringement must be such as is calculated to mislead the public with respect to the origin or ownership of the goods and thus to invade the right of the registrant to the use of the name or term as a designation of his merchandise. This we conceive to be the meaning of the statute. It follows that where the mark consists of a surname, a person having the same name and using it in his own business, although dealing in similar goods, would not be an infringer, provided that the name was not used in a manner

tending to mislead and it was clearly made to appear that the goods were his own and not those of the registrant. This is not to say that, in this view, the case becomes one simply of unfair competition, as that category has been defined in the law; for, whatever analogy may exist with respect to the scope of protection in this class of cases, still the right to be protected against an unwarranted use of the registered mark has been made a statutory right, and the courts of the United States have been vested with jurisdiction of suits for infringement, regardless of diversity of citizenship. Moreover, in view of this statutory right, it could not be considered necessary that the complainant in order to establish infringement should show wrongful intent in fact on the part of the defendant, or facts justifying the inference of such an intent. Having duly registered under the act, the complainant would be entitled to protection against any infringing use; but, in determining the extent of the right which the statute secures and what may be said to constitute an infringing use, regard must be had, as has been said, to the nature of the mark and its secondary, as distinguished from its primary, significance.

The distinction between permissible and prohibited uses may be a difficult one to draw in particular cases but it must be drawn in order to give effect to the act of Congress. That the distinction may readily be observed in practice is apparent. In this case, for instance, if the defendants had so chosen, they could have adopted a distinct mark of their own, which

would have served to designate their inks and completely to distinguish them from those of the complainant. It was not necessary that, in exercising the right to use their own name in trade, they should imitate the mark which the complainant used, and was entitled to use under the statute, as a designation of its wares; or that they should use the name in question upon their labels without unmistakably differentiating their goods from those which the complainant manufactured and sold.

Justice Hughes' outlook upon business problems would seem to be four-square with his declaration of 1908:

It is the function of law to define and punish wrong-doing, and not to throttle business. In the fields of industrial activity the need is that trade should be fair; that unjust discriminations and illegal allowances giving preferential access to markets should be prevented; that coercive combinations and improper practices to stifle competition should be dealt with regardless of individuals; but that honest industry, obtaining success upon its merits, denying no just opportunity to its competitors, should not be put under prohibitions which mingle the innocent and the guilty in a common condemnation.

The line of progress lies not in arbitrary action but in securing suitable publicity and supervision, and by accurate definition of wrongs and the infliction of proper punishment. The processes of justice may be slower and more

laborious; but if we desert the lines of soberness and fair play to get quick results through arbitrary interferences with trade, we shall find that such short cuts lead only to disaster.

CHAPTER XI

THE CASE OF LEO M. FRANK AND A PUZZLING QUESTION OF NATIONAL RESPONSIBILITY

Occasionally there comes to that august chamber in the Capitol a cause on fire with the heat of racial or social controversy—a cause in which men's deepest feelings have been aroused, public opinion has been sharply aligned, and elemental forces of prejudice and passion have entered an atmosphere where should prevail only impersonal arbitrament under law. At such a time and in such a cause, it becomes one of the great stabilising prerogatives of our revered tribunal to restore to the final determination of the case that perfect fairness, that assurance of freedom from outside influence, and that deep regard for the substance of right and the fundamentals of fair trial, which are the heritage of Anglo-Saxon jurisprudence and the high privilege of every person accused of crime in an American State. In the impressive presence of the Nation's Court and in the contemplation of all it has typified in the imperishable traditions of the Republic, the voices of tumult and antagonism are stilled, and the rancour of the city street and countryside gives way

to the reasoned impartiality of a law-governed Court. Passion and prejudice may have mightily muddled the facts and the issues; public opinion may have found itself unable to see truly or think clearly, in judging of the merits of the bitter controversy; yet amid such a setting of the cause before it, the Supreme Court performs one of its most valuable functions as an expert interpreter and aid of the ultimate consensus of public opinion, through a clear and patient statement of the facts, a fair demarcation of the real issues, and a resolute re-formulation of the applicable essentials.

Such a controversy was presented by the appeal to the Supreme Court from the refusal of the United States District Court for the Northern District of Georgia to grant or hear and try the writ of *habeas corpus* for which application was made in behalf of Leo M. Frank, a former resident of New York City, who had been convicted in the Georgia State Courts of the murder of a girl of tender years, employed in an Atlanta pencil factory, of which he was superintendent. The resources of appeal and motions for a new trial had been exhausted in behalf of the accused, so far as the State Courts were concerned, and the regularity of the proceedings incident to his trial and conviction had been in all respects sustained. The Supreme Court of the United States was not unanimous in its approval of the action of the United

States District Judge, in refusing the application for the writ without the taking of testimony to ascertain the truth or falsity of the serious allegations of the petition; Justice Holmes and Justice Hughes were in fact constrained to dissent from the prevailing view; but no one can read or re-read the majority and minority opinions in this case [1] without gaining a higher respect for the Court which DeTocqueville said, eighty-one years ago, was "at the head of all known tribunals."

The issue before the Supreme Court was not whether Frank was innocent or guilty of murder, or whether he should be sentenced to death or set free. No one denied that these matters were to be decided, in all respects, by the State Courts of Georgia and under its laws. The issue before the Supreme Court was not whether incidents of outside influence and manifestations of prevalent hostility to the accused, had in fact brought about his conviction under circumstances denying the fundamentals of a fair trial. The United States District Judge had taken no proof to determine the truth or falsity of these allegations, and the Supreme Court, on the appeal from his refusal of the writ, was at least in no better position to judge of the facts on that issue. The question was not at all one of racial hostility to Frank in Georgia, if there was such hostility, or of racial interference in behalf of Frank, if there had been such inter-

[1] *Frank* vs. *Mangum* (237 U. S. Reports, page 309).

ference. The Supreme Court cut straight through all of these matters to the question necessarily to be decided—a question of the most far-reaching importance to our whole judicial and governmental system, rising far above the eventualities of the fate of the particular prisoner at the bar.

The actual point of decision was whether the United States District Court was right, upon the allegations of the petition as to the proceedings had with reference to Frank, in refusing to entertain the writ and proceed to determine whether there was foundation *in fact* for the charges that Frank did not have a trial uninfluenced by external pressure of angered public opinion. The majority of the Supreme Court upheld this refusal, on the ground that inasmuch as there was no challenge of the constitutionality or validity of any statute under which he was tried and the conduct of his trial conformed to all the forms of law, and inasmuch as the *State Supreme Court* had decided, after having before it evidence adduced on the subject, that there was no foundation *in fact* for Frank's charges of "mob influence" on the jury's action, every requirement of a fair trial and "due process" had been met and the *Federal Courts* had no reason or right to proceed to inquire into the facts and consider substitution of their judgment for that of the highest Court of the State on the question whether the

requirements of fair trial had *in fact* been fulfilled.

From the majority determination Justice Holmes and Justice Hughes dissented, because of a belief that under the "due process" clause, the Nation's Supreme Court has the ultimate responsibility for determining whether any person, of high or low estate, of any race or creed, has in fact been convicted of high crime under circumstances where external influence made the court-room proceedings a mere form and shell, so far as fair determination of actual guilt or innocence was concerned. They did not undertake to say that Frank had or had not a fair trial, or should have a new trial; they did not undertake to say whether the allegations made in his behalf were true or false; they did, however, believe that when such an issue was raised, it was the solemn duty of the Federal Court to take the testimony and find out the facts on that issue, and that under the great guaranties of Magna Charta and the Bill of Rights as embodied in the National Constitution, the determination of even the highest State Court cannot be accepted as in all events final and conclusive upon the question whether those guaranties were actually infringed. Said Justice Holmes, in ruling that the matter should go back to the District Court to take testimony on the question whether there had been improper influences pervading the trial:

Mr. Justice Hughes and I are of opinion that the judgment should be reversed. The only question before us is whether the petition shows on its face that the writ of *habeas corpus* should be denied, or whether the District Court should have proceeded to try the facts. The allegations that appear to us material are these. The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment stationed in that city, both of whom were known to the jury. On the same day, the evidence seemingly having been closed, the public press, apprehending danger, united in a request to the Court that the proceedings should not continue on that evening. Thereupon the Court adjourned until Monday morning. On that morning when the Solicitor General entered the court he was greeted with applause, stamping of feet and clapping of hands, and the judge before beginning his charge had a private conversation with the petitioner's counsel in which he expressed the opinion that there would be "probable danger of violence" if there should be an acquittal or a disagreement, and that it would be safer for not only the petitioner but his counsel to be absent from Court when the verdict was brought in. At the judge's request they agreed that the petitioner and they should be absent, and they kept their word. When the verdict

was rendered, and before more than one of the jurymen had been polled there was such a roar of applause that the polling could not go on until order was restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors although he was only ten feet from them. With these specifications of fact, the petitioner alleges that the trial was dominated by a hostile mob and was nothing but an empty form.

We lay on one side the question whether the petitioner could or did waive his right to be present at the polling of the jury. That question was apparent in the form of the trial and was raised by the application for a writ of error; and although after the application to the full Court we thought that the writ ought to be granted, we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States. But *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.

The argument for the appellee in substance is that the trial was in a court of competent jurisdiction, that it retains jurisdiction although, in fact, it may be dominated by a mob, and that the rulings of the State court as to the fact of such domination cannot be reviewed. But the argument seems to us inconclusive. Whatever disagreement there may be as to the

scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorised jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the State court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. The loss of jurisdiction is not general but particular, and proceeds from the control of a hostile influence.

When such a case is presented, it cannot be said, in our view, that the State court decision makes the matter *res judicata*. The State acts when by its agency it finds the prisoner guilty and condemns him. We have held in a civil case that it is no defence to the assertion of the Federal right in the Federal court that the State has corrective procedure of its own—that still less does such procedure draw to itself the final determination of the Federal question. *Simon* v. *Southern Ry.*, 236 U. S. 115, 122, 123. We see no reason for a less liberal rule in a matter of life and death. When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. *Kansas Southern Ry.* v. *C. H. Albers Commission Co.*,

223 U. S. 573, 591. *Nor. & West. Ry.* v. *Conley,* March 8, 1915, 236 U. S. 605. Otherwise, the right will be a barren one. It is significant that the argument for the State does not go so far as to say that in no case would it be permissible on application for *habeas corpus* to override the findings of fact by the State courts. It would indeed be a most serious thing if this Court were so to hold, for we could not but regard it as a removal of what is perhaps the most important guaranty of the Federal Constitution. If, however, the argument stops short of this, the whole structure built upon the State procedure and decisions falls to the ground.

To put an extreme case and show what we mean, if the trial and the later hearing before the Supreme Court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this Court would allow itself to be silenced by the suggestion that the record showed no flaw. To go one step further, suppose that the trial had taken place under such intimidation and that the Supreme Court of the State on writ of error had discovered no error in the record, we still imagine that this court would find a sufficient one outside of the record, and that it would not be disturbed in its conclusion by anything that the Supreme Court of the State might have said. We therefore lay the suggestion that the Supreme Court of the State has disposed of the present question by its judgment on one side along with the question of the appellant's right to be present. If the petition discloses facts that amount to a loss of

jurisdiction in the trial court, jurisdiction could not be restored by any decision above. And notwithstanding the principle of comity and convenience (for in our opinion it is nothing more, *United States* v. *Sing Tuck,* 194 U. S. 161, 168), that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of *habeas corpus,* when, as here, that resort has been had in vain, the power to secure fundamental rights that had existed at every stage becomes a duty and must be put forth.

The single question in our minds is whether a petition alleging that the trial took place in the midst of a mob savagely and manifestly intent on a single result, is shown on its face unwarranted, by the specifications, which may be presumed to set forth the strongest indications of the fact at the petitioner's command. This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere. And when we find the judgment of the expert on the spot, of the judge whose business it was to preserve not only form but substance, to have been that if one juryman yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob. Of course we are speaking only of the case made by the petition, and whether it ought to be

heard. Upon allegations of this gravity in our opinion it ought to be heard, whatever the decision of the State court may have been, and it did not need to set forth contradictory evidence, or matter of rebuttal, or to explain why the motions for a new trial and to set aside the verdict were overruled by the State court. There is no reason to fear an impairment of the authority of the State to punish the guilty. We do not think it impracticable in any part of this country to have trials free from outside control. But to maintain this immunity it may be necessary that the supremacy of the law and of the Federal Constitution should be vindicated in a case like this. It may be that on a hearing a different complexion would be given to the judge's alleged request and expression of fear. But supposing the alleged facts to be true, we are of opinion that if they were before the Supreme Court it sanctioned a situation upon which the Courts of the United States should act, and if for any reason they were not before the Supreme Court, it is our duty to act upon them now and to declare lynch law as little valid when practised by a regularly drawn jury as when administered by one elected by a mob intent on death.

There is an old maxim that "hard cases make bad law," but the manner of its application to the *Frank* case may not be beyond peradventure. Of course, it is a startling suggestion that, with all the difficulties already encountered in making the processes of the crimi-

nal law prompt and efficacious, there should be added the possibility of an appeal, in some instances, to the Federal Courts, through applications for a writ of *habeas corpus,* with the resultant delay through the time required for determination in the Federal jurisdiction. The theory had been, and remains, that unless the statutes under which the trial took place, or the form of proceedings had, presented a clear Federal question, challenging the validity of the whole trial and the conviction ensuing thereon, the action of the State Court was unreviewable in the Federal Court, through writ of *habeas corpus* or any other procedure which could delay the execution of the mandate of the State Court without the affirmative action of the Supreme Court or one or more Justices thereof.

The question raised by Justices Holmes and Hughes may not, however, be regarded as disposed of never to recur. The question may perhaps be stated in this direct and concrete way: Suppose John Jones, whom you knew well, instead of Leo Frank, whom you did not know at all, were convicted of murder and was about to be hanged. He had been tried in the State Court, and his conviction had been confirmed on appeal. Under the Federal law, available to every man on equal terms, he was entitled to a writ of *habeas corpus* if he were held in custody as a result of proceedings violative of the Federal Constitution. Provisions of the Federal Constitution make it a National duty that the

Federal courts shall see to it that nothing happening in a State court shall deprive any man of his life or his liberty without a trial in fact *fair*. Suppose the State court, the fairness of whose proceedings was challenged, had decided that its proceedings were in fact fair and violated no right under the constitutional guaranties. Suppose John Jones then offered to the Federal District Court evidence which, *if true,* showed that his trial was not in fact fair, within the meaning of the Federal Constitution; and Jones said that he wanted his writ of *habeas corpus,* which the Federal statute said he was entitled to when he was held in custody under proceedings not amounting to the fair trial guaranteed by the Federal Constitution. Would *you* think it would then be the duty of the Federal court to go ahead, hear the other side, take all the facts, and then see to it whether Jones' story was true as to what took place on the trial and whether any requirement of the Federal Constitution had in fact been violated, or ought the Federal court just to let the decision of the State court on the question stand as conclusive without hearing any of the evidence on the question of the fairness of the trial?

Has the National judicial power now no responsibility as to what happens to Jones, if he offers evidence and makes allegations which, *if true,* would show that he had been convicted through the withholding of the kind of a trial

which the Constitution says the National power shall not permit any State to deny to any man? Or shall the Fourteenth Amendment be amended, by action of the States or judicial construction, so as to read, in effect, that

No State shall deprive any person of life, liberty or property without due process of law; . . . provided, however, that nothing herein contained shall be construed to require or authorise the National judicial power to take any action to prevent a State from depriving a person of life or liberty without a fair trial, if the State shall have itself determined that a fair trial was had.

That is a query rather more far-reaching than the fate of your friend Jones—or Leo M. Frank.

CHAPTER XII

COMMUNAL PROPERTY AND RELIGIOUS ORDERS

In determining an action brought by the Order of St. Benedict of New Jersey against one Steinhauser,[1] administrator of the estate of a deceased member of the Order, the Supreme Court, through Justice Hughes, drew clearly the distinction between ecclesiastical requirements and civil rights and laid down a broad doctrine as to the lawfulness of communal agreements such as those on which have been based a considerable number of co-operative communities, in the United States and abroad.

The complainant in the case was The Order of St. Benedict of New Jersey, a corporation of that State. This Order was a monastic brotherhood, established at Subacio, Italy, by St. Benedict in the early part of the sixth century. It was brought to America in 1846. One of the distinctive features of the Order is the obedience of its members to what is known as "The Rule of St. Benedict," a collection of mandates enjoining obedience, stability, chastity and poverty. In New Jersey the brotherhood was incorporated, in 1868, by special act

[1] 234 U. S. Reports, page 640.

of the Legislature, and therefore, as the opinion of the Court indicated, at the outset:

We are not concerned in the present case with any question of ecclesiastical requirement or monastic discipline. The question is solely one of civil rights. The claim in suit rests upon the Constitution of the complainant corporation, and the obligations inherent in membership.

The incorporators of the New Jersey corporation were described as being "a society of religious men living in community and devoted to charitable works and the education of youth." Pursuant to the charter of incorporation, the Order adopted a Constitution, which provided that membership was "lost at once":

1. By being dismissed according to the disciplinary statutes of the Order of Benedict of New Jersey. . . .
2. By voluntarily leaving the Order for any purpose whatsoever.
3. By joining any other order or secret society or any other religious denominations.

The Constitution also provided that

Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of the said Order and the individual earnings of its members are and must be considered as common property of the Order. . . .

It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey and no further.

Augustin Wirth was a Bavarian, who took the solemn vows of the Order in Pennsylvania in 1852, and was ordained to the priesthood. In 1888 he became a member of the Order in New Jersey and remained in membership until his death. From time to time he published books on religious subjects. His contracts with publishers were made, and the copyrights obtained by him, under the name of "Augustin Wirth, O. S. B." After his death the New Jersey corporation claimed the royalties on the books and personal property consisting chiefly of the proceeds of sales of the books. The Supreme Court, applying to the affairs of the corporation and the agreements of its members the same standards which would and should be applied in a case involving the rights of any other corporation, held that

According to the principles of the complainant's organisation, Father Wirth was not entitled to retain for his own benefit either the moneys which he received for his services in the various churches with which he was connected or those which he derived from the sale of his books. By the explicit provision of the Consti-

tution of the complainant, it was a necessary consequence of his continued membership, that his gains—from whatever source—belonged to it.

Thus was a very simple question of the construction of corporate by-laws succinctly answered. Father Wirth's administrator contended, however, that the obligation embodied in the Constitution of the New Jersey corporation was one which the Courts should not enforce. To this the opinion of a unanimous Court, prepared by Justice Hughes, replied:

We are thus brought to the question whether the requirement, which lies at the foundation of this suit, is void as against public policy; that is, whether, by reason of repugnance to the essential principles of our institutions, the obligation though voluntarily assumed, and the trust arising from it, cannot be enforced. In support of this view, it seems to be premised that a member of the Order can be absolved from his vows only by the action of the Head of the Church and that unless the requisite dispensation is thus obtained the member is bound for life in temporal, as well as in spiritual, affairs. This, it is said, is the necessary import of testimony given by the Abbot. It is thus assumed that the vows in connection with the "Rule" bind the member in complete servitude to the Order for life or until the Head of the Church absolves him from his obligations; and it is concluded that an agreement for such a sur-

render, being opposed to individual liberty and to the inherent right of every person to acquire and hold property, is unenforceable in the civil courts and cannot form the basis for an equitable title in the complainant.

This argument, we think, disregards the explicit provision of the complainant's Constitution as to voluntary withdrawal. It overlooks the distinction between civil and ecclesiastical rights and duties; between the Order of St. Benedict of New Jersey, a corporation of that State, and the monastic brotherhood subject to church authority; between the obligation imposed by the corporate organisation and religious vows.

As we have said, the question here is not one of canon law or ecclesiastical polity. The requirement of complainant's Constitution must be read according to its terms and its validity must be thus determined. Granted that it is to be examined in the light of that to which it refers, still, obligations which are inconsistent with its expressed provisions cannot be imported into it. This Constitution, as already stated, definitely provides: "Membership is lost at once: 2. By voluntarily leaving the Order for any purpose whatsoever." (Section XI.) This language cannot be taken to mean other than what it distinctly says. So far as the corporation, and the civil rights and obligations incident to membership therein, are concerned, it leaves no doubt that the member may voluntarily leave the Order at any time. His membership in the corporation, and the obligation he assumes, are subject to that condition. If

he severs his connection with the corporation, it cannot be heard to claim any property he may subsequently acquire. His obligation runs with his membership and the latter may be terminated at will.

With this privilege of withdrawal expressly recognised, we are unable to say that the agreement—expressed in Sec. XII of the complainant's Constitution—that the gains and acquisitions of members shall belong to the corporation, must be condemned. These go to the corporation in exchange for the privilege of membership and to further the common purpose to which the members are devoted. No constitutional right is invaded and no statutory restriction is transgressed. The legislature of New Jersey, which, subject to constitutional inhibition, is the arbiter of the public policy of that State, granted the charter by special act to the Benedictine Society of "religious men living in community," and it cannot be said that the Constitution adopted by the Order was repugnant to the charter provisions or exceeded the authority plainly intended to be conferred. It would seem to be clear that the obligation assumed instead of being opposed to the public policy of the State where it was created was directly sanctioned.

The decision has also interesting social aspects because of its observations as to the lawfulness of a form of agreement for living in community and holding all property and income

in common. "The validity of agreements providing for community ownership," declared Justice Hughes, "with renunciation of individual rights of property during the continuance of membership in the community, where there is freedom to withdraw, has been repeatedly affirmed." The legal sanction for several communal societies, such as the "Separatists,"[1] the "Harmony Society" community[2] of Pennsylvania, and the "Oneida Community"[3] of New York, is set forth. Viewing the matter "solely as a business undertaking," the Court found nothing subversive of law or public policy in such a community arrangement, and quoted with approval the New York Court of Appeals' characterisation of the Oneida Community, the "basic proposition" of which was said to be

> . . . the absolute and complete surrender of the separate and individual rights of property of the persons entering it; the abandonment of all purely selfish pursuits, and the investiture of the title to their property and the fruits of their industry in the common body, from which they could not afterwards be severed or withdrawn except by unanimous consent. It was fashioned according to the Pentecostal ideal, that all who

[1] *Goesele* vs. *Bimeler* (14 Howard's Reports, page 589).
[2] *Schwartz vs. Duss* (187 U. S. Reports, page 8).
[3] *Burt* vs. *Oneida Community* (137 N. Y. Reports, page 346).

believed should be together and have all things common. It was intended to be in fact, as they frequently styled themselves, but a single family upon a large scale with only one purse, where self was to be abjured and the general good alone considered.

CHAPTER XIII

THE "SEPARATE-COACH" LAW AND THE SLEEPING CAR

CONSTITUTIONAL aspects of the perennial problem of equality in transportation accommodations for the white and African races, were before the Supreme Court at the end of 1914, in a controversy [1] involving the so-called "Separate-Coach" law of the State of Oklahoma. A day or two before this law was to go into effect five negro citizens of the State applied to the Federal courts for an injunction against five railroad companies, to restrain the companies from complying with the provisions of the statute. They asked for this on the twofold ground, in substance, that its plan of separate, but supposedly equal, facilities for the two races, was repugnant to the "commerce clause" and to the Fourteenth Amendment of the Federal Constitution. The United States Circuit Court and the Circuit Court of Appeals for the Eighth Circuit, which is one of the Western Circuits, sustained demurrers to the bills filed by the complainants and ruled adversely to their right

[1] *McCabe* vs. *Atchison, T. & S. F. Ry. Co.* (235 U. S. Reports, page 151).

to stop the taking effect of the statute upon the allegations made by them. When they brought their complaints to the Supreme Court, that tribunal without dissent affirmed the action of the courts below and held that the suit could not be maintained. Justice Hughes wrote the opinion of the Court, and declared a result concurred in by all his colleagues.

The social, political, or ethnological expediency of the Oklahoma "Separate-Coach" law, of course, was not passed upon by the Supreme Court or written about by Justice Hughes. The question before the Court and before him was the legal and constitutional question of the correctness of the challenge that the statute, in its tenor and practical workings, would impinge upon rights assured by the Federal Constitution. Members of the Court, in passing upon a statute enacted by a State, may feel the measure to be very wise and salutary, yet unconstitutional; or they may deem the measure to be highly unwise and inexpedient, yet unproscribed by the fundamental law. Questions of expediency have to be left to the Legislatures and Governors, and questions of infringement of fundamental right have to be faced, without expression of independent judgment as to the social wisdom of the measures under consideration. No doubt some of the members of the Supreme Court would have voted for, and others would have voted against, the "Separate-Coach" law had they

been sitting, in December, 1907, as members of the Oklahoma Legislature; but as Justices of the Supreme Court, the men from New York, New Jersey, Massachusetts, Ohio, Wyoming and California voted in unison with the men from Louisiana, Georgia and Tennessee, in holding that the five negroes who started the suit had not made out a case for redress under the Federal Constitution. Upon one phase of the provisions of the statute—in relation to Pullman and dining-car facilities—Justice Hughes reached a conclusion that the plan sanctioned might operate to deny to African citizens the equal protection of the laws and so entitle persons actually aggrieved to bring their complaints to Court. As to this aspect of the matter, Chief Justice White and Associate Justices Holmes, Lamar and McReynolds evidently found themselves more fully in accord with the outcome reached than with the reasoning, and so concurred "in the result."

The statute under attack required each railway company to "provide separate coaches or compartments, for the accommodation of the white and negro races, which separate coaches or cars" shall "be equal in all points of comfort and convenience." At passenger depots, "separate waiting-rooms," likewise with equal facilities, were required. The statute, moreover, provided that the term "negro," as used therein, should include every person of African descent, as defined by the State Constitution, and

that each compartment of a railway coach, "divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach," within the meaning of the law.

Justice Hughes ruled that, as to the provisions above quoted, the statute gave the complainants no ground for objection to its enforcement. "It had been decided by this Court, so that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a State to require separate, but equal, accommodations for the two races." So far as the Federal Constitution is concerned, a State, through its legislature, may require, as some States in effect do, equal and *common* facilities for the two races, or may, as some other States do, require equal and *separate* facilities. Members of the African race are entitled to address to the Federal courts any complaint as to *distinction* in extent or quality of the accommodations afforded the two races on railroad trains; they cannot be heard to complain to the court, as distinguished from the legislature, of distinction in *identity* of the accommodations afforded or against *separation* in equal accommodations.

This was held in the case of *Plessy* against *Ferguson*,[1] cited in the opinion written by Justice Hughes. The *Plessy* case involved a Louisiana statute which required the carriers to provide separate accommodations for the white and

[1] *Plessy* vs. *Ferguson* (163 U. S. Reports, page 540).

coloured races. The Supreme Court not only sustained the law but also justified as reasonable the distinction between the races on account of which the statute was enacted and enforced. The test of the reasonableness of legislation was declared to be "the established usages, customs and traditions of the people" and the "promotion of their comfort and the preservation of public peace and good order"; and in the action brought by one *Chiles* against the *Chesapeake and Ohio Railway Company,*[1] it was held that the railway companies themselves had the power to establish similar regulations, for a like purpose and to secure like results, and at least in the absence of Congressional action on the subject, could make such regulations applicable to interstate as well as intrastate traffic. The Supreme Court in the *Chiles* case added:

> Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable.

As to the charge that the statute contravened the "commerce clause" of the Constitution, through invasion of the interstate domain committed to the exclusive power of Congress, the Court, in the Oklahoma case, said:

[1] *Chiles* vs. *Chesapeake & Ohio Ry. Co.* (218 U. S. Reports, page 71).

The act, in the absence of a different construction by the State Court, must be construed as applying to transportation exclusively intrastate and hence did not contravene the commerce clause of the Constitution.

This ruling was of course made in the light of the previous holding of the Supreme Court that "whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be determined by Congress alone,"[1] and that "the inaction of Congress was equivalent to the declaration that a carrier could by regulations separate coloured and white interstate passengers."[2]

The Oklahoma statute contained, however, a proviso that nothing in it contained should be construed to prevent railway companies "from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly." It was contended, with a great deal of vigour and plausibility, in behalf of the railroad companies and the State of Oklahoma, that this proviso, based palpably on the necessities of "through" traffic, did not by its terms offend against the rule of equal treatment which all men have a right to demand at

[1] *Louisville, etc., Ry. Co.* vs. *Mississippi* (133 U. S. Reports, pages 587, 590).

[2] *Hall* vs. *De Cuir* (95 U. S. Reports, 485).

the hands of utilities operating under public franchises. It was argued that this clause sanctioned the hauling of sleeping cars and dining and chair cars used exclusively and separately by either race, and that violation of the rule of equality in accommodations would take place only if the railway companies provided cars of this type and quality for the exclusive use of white passengers and yet, in the face of considerable demand, failed to furnish similar and separate facilities for negro passengers. The Circuit Court and the Circuit Court of Appeals sustained this view, and held that inasmuch as these types of cars were, comparatively speaking, luxuries, it was competent for the legislature and the railway companies to take into account the limited demand for such accommodations on the part of the African race, as compared with the more general demand on the part of the white race.

With characteristic instinct for the substance rather than the guise of things and for the facts as to the way in which a statutory provision actually works rather than for mere phraseology which may be employed to create an appearance of consonance with fundamentals, Justice Hughes was unable to give sanction to this reasoning of the lower Court.

"It is not questioned," said he, after quoting the statute, "that the meaning of this clause is that the carriers may provide sleeping cars, dining cars and chair cars exclusively for white

persons and provide no similar accommodations for negroes. The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. . . . This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons travelling under like conditions cannot be refused."

Justice Hughes expressed, however, the opinion of the Court that the allegations of the complainants showed no discrimination in fact against the constitutional rights of any of them, and the Circuit Court's denial of injunctive relief was affirmed without dissent.

CHAPTER XIV

STANDARDS OF OFFICIAL RESPONSIBILITY AND THE EFFICIENCY OF ADMINISTRATIVE ADJUSTMENTS

In a number of opinions prepared by Justice Hughes there seems to be discernible a very definite concept of the standards of official discretion, duty and responsibility, and of the expedients which make administrative mechanisms workable and efficient. In the *United States* against *Citroen*,[1] after laying down an interpretation of certain puzzling sections of the Tariff Act of 1897, in harmony with the known facts of the trade and the policy embodied in former tariff legislation, he added: "Such an interpretation provides a simple and workable test, permitting certainty and impartiality in administration which should pre-eminently characterise the operation of tariff laws, and fulfils, as we believe, the purpose of Congress." In *Collins* against *Kentucky*,[2] his voice was raised in condemnation of a penal statute which "prescribed no standard of conduct that it was possible to know," a statute which "violated the fundamental principles of

[1] 223 U. S. Reports, page 424.
[2] 234 U. S. Reports, page 634.

justice . . . in compelling men on peril of indictment to guess'' as to facts not ascertainable. In the *United States* against *Smull,*[1] the United States District Court had held that a false affidavit, made before a receiver of the Land Office, that the applicant had not theretofore made any entry under the homestead laws, did not warrant indictment of the affiant for perjury, inasmuch as the taking of any such oath was not authorised or required by any Act of Congress, but only by a regulation of the Land Department. Justice Hughes cut straight through this claim by which the maker of a false oath for the purpose of defrauding the Government was to go unpunished; he held that knowingly swearing falsely to an affidavit required by an authorised regulation of the Land Department as fully sustained a charge of perjury as though the oath had been explicitly required by the wording of an Act of Congress.

In the *United States* against *Birdsall,*[2] a similar edifice of circumlocution had been reared to persuade the United States District Court that Birdsall was not guilty of bribery. The District Court let Birdsall go free. Justice Hughes, on the contrary, gave efficacy to the anti-bribery statute. He held that ''every action that is within the range of official duty comes within the purview of'' the anti-bribery sections, and that ''to constitute it official ac-

[1] 236 U. S. Reports, page 405.
[2] 233 U. S. Reports, page 223.

tion, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting. . . . Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. . . . In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery." And Justice Hughes was one of the Justices concurring in that classic opinion[1] sustaining the validity of President Taft's order withdrawing from public entry, without Congressional sanction, vast areas of public lands on which oil had been discovered, in which the Court declared that

. . . government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorised acts would not have been allowed to be so often repeated as to crystallise into a regular practice. That presumption is not reasoning in a

[1] *U. S.* vs. *Midwest Oil Co.* (236 U. S., 459).

circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight should be given to the usage itself—even when the validity of the practice is the subject of investigation.

Perhaps there is an inkling, also, of an outlook upon problems of discipline and departmental authority in the Army and Navy, in a decision like that in the *United States* against *Ross*,[1] where Justice Hughes said: "If in the practical judgment of the military authorities, the efficient management of a general hospital requires the maintenance of both a telephone and telegraph office, we know of no reason for 'making a judicial determination based upon a contrary assumption.' Certainly the question was one calling in the first instance for the practical judgment of the Department. . . . In the conduct of an institution like a general hospital . . . there is every reason for caution, and for the exercise of careful official judgment. . . . We are asked to overrule this departmental judgment. . . . We find no basis for such action." Justice Hughes added that the Court was not at liberty to do any such thing "unless there is a clear abuse of the necessary official discretion. No such abuse is shown here." Likewise in *Reaves* against *Ainsworth*,[2]

[1] 239 U. S. Reports, page 530.
[2] 219 U. S. Reports, page 296.

a unanimous Court declared, on a question of the retirement of an Army officer:

The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. . . . If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.

Elsewhere in the same opinion the Court said:

What is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts.

It remains to refer briefly to questions presented by some of the newer governmental mechanism, products of a popular disposition to which Justice Hughes referred in his address before the Bar Association:

When the people have determined to exercise governmental control, they are disposed to utilise freely whatever powers they find at their immediate command, caring little for former divergencies of political theory.

The first is as to the right of the people of a State in their discretion to adopt and use expedients such as the initiative, referendum and recall, deemed by some to be the acceptable means of ensuring to the repositories of the sovereign political power an adequate ultimate check upon the misuse of representative and executive processes, and deemed by others to usher in a radical subversion of fundamentals of that "republican form of government" which section four of article IV of the Constitution says "the United States shall guarantee to every State in this Union." Justice Hughes was a member of the Supreme Court at the time it was asked to deny to the people of a State the power to adopt measures of this character. Although he did not prepare the opinion of the Court in either of the cases [1] in which the issue was determined, he was one of a unanimous

[1] *Pacific Telephone Co.* vs. *Oregon* (223 U. S. Reports, page 118); *Kiernan* vs. *Portland, Oregon* (223 U. S. Reports, page 151).

Court which ruled that the question is "political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power." The Supreme Court held that nothing in the Constitution authorised the judiciary to substitute its own judgment for the judgment of Congress upon a matter purely political and specifically committed to the judgment of Congress. Every citizen would gain a clearer idea of the fundamentals of government and the necessary boundaries of political and judicial power, from a reading of the opinions of Chief Justice White in these two Oregon cases.[1]

It has been brilliantly said that "the capital fact in the mechanism of modern states is the energy of legislatures." Yet this fact, in itself, does not seem to have been either surprising or distressing to Justice Hughes. In the same address before the New York State Bar Association, he cited numerous instances of the "new exertions" of governmental power which "have followed each other in swift succession, reflecting convictions of recent origin with respect to National needs," and added:

What this means is apparent. Abounding activities and facility of intercourse have been

[1] *Pacific Telephone Co.* vs. *Oregon* (223 U. S. Reports, page 118); *Kiernan* vs. *Portland, Oregon* (223 U. S. Reports, page 151).

producing the natural legislative reactions. . . . In the mere multiplication of laws, when this is considered relatively to the growth of the country, there is nothing novel. This is an ancient grievance, and the significance of its continuance lies in the showing of the reluctance of democracy to forego legislative opportunities in the interest of simplicity and efficiency. I see no prospect of remedying the evil of needless multiplicity until in the place of merely general lamentations and futile inveighing against "too much law," enlightened opinion shall aim at securing improvement in those cases in which the mischief is especially prominent and some measure of relief is not wholly impracticable: For example (1) by increasing restrictions against special and private legislation, not only through constitutional provisions where these are appropriate, but by changes in the rules of legislative bodies with respect to the consideration of private bills; (2) by the development in local communities of the sense of civic responsibility which will lead to intrusting each municipality with the care of its purely local affairs under rules of its own making; (3) by seeking to deal with matters of general concern, though within State power, through uniform State laws not only enacted but maintained as such both by force of the public judgment and by the efforts of the Bench to avoid conflicting interpretations, and (4) by seeking to provide a simple judicial procedure which shall not be a legislative patchwork. We are apt to be suspicious of everything but generalisations, and we find it hard to agree on the details of constructive en-

terprise. But gains are always possible through a wise direction of effort, and if legislatures are relieved of unnecessary burdens there will be opportunity for increased care in formulating and adopting new laws.

In his career at the Bar, and during his service as Governor of New York, Mr. Hughes had manifested a predilection for the reasoned and impartial judgment of men of special knowledge and qualifications, whenever any intricate matter of human welfare, public service or trade adjustment was at issue. Where facts were to be collected as basis for legislative or executive judgment or the development of public opinion; when evidence was to be weighed and relative advantages and disadvantages sifted and counter-balanced; when a rule of public policy determined by the people or legislature was to be applied to the multitudinous details of a highly organised industry or community life, he believed that the public should call into action the best talent at its command, instead of leaving the subject, for example, to the slip-shod and off-hand manner in which legislative bodies often act upon matters of that kind. His willingness to follow wherever the facts and the ultimate preponderance of public advantages seemed to advise, led him to insist that the facts be first brought together by men expert and disinterested; and his knowledge of the history of human institutions persuaded

him that matters of inquiry, analysis and determination may most effectively be conducted by small and expert bodies, reserving to the people as a whole and their legislative representatives the basic task of deciding upon the controlling policies and principles. Several of his most stirring contests as Governor were in vindication of this concept of genuinely expert guidance and action, in the first instance, upon matters of this kind.

It has been perhaps natural, therefore, that in opinions [1] prepared by him as a member of the Supreme Court, we find a disposition, on the one hand, to uphold the efficacy of expert administrative commissions and give broad scope to their "on-the-spot" judgment of conditions, and, on the other hand, to confine the activities of these agencies to the salutary limits of a reasonable and open-minded exercise of discretion under the disclosed facts. The bearings of the whole matter were clearly explained by him before the Bar Association. After referring to what he termed "a new era in the development of our law," and pointing out the rapid advances in the exercise of governmental power for the better adjustment of public services and the extension of human welfare, he commented upon the propriety of committing certain

[1] *Louisville & N. R. R. Co.* vs. *Garrett* (231 U. S. Reports, page 298); *Los Angeles Switching Cases* (234 U. S. Reports, page 294).

phases of these matters to expert "administrative agencies":

With this noteworthy change in point of view, there have been constant manifestations of a deepening conviction of the impotency of Legislatures with respect to some of the most important departments of lawmaking. Complaints must be heard, expert investigations conducted, complex situations deliberately and impartially analysed, and legislative rules intelligently adapted to a myriad of instances falling within a general class. It was not difficult to frame legislation establishing a general standard, but to translate an accepted principle into regulations wisely adapted to particular cases required an experienced body sitting continuously and removed so far as possible from the blandishments and intrigues of politics. This administrative type is not essentially new in itself, but the extension of its use in State and Nation constitutes a new departure. The doctrine that the Legislature cannot delegate its power has not been pushed so far as to make needed adaptation of legislation impossible, and reconciliation has been found in the establishment by the Legislature itself of appropriate standards governing the action of its agency. The ideal which has been presented in justification of these new agencies, and that which alone holds promise of benefit rather than of hurt to the community, is the ideal of special knowledge, flexibility, disinterestedness and sound judgment in applying broad legislative principles that are essential to the protection of the

community, and of every useful activity affected, to the intricate situations created by expanding enterprise. But mere bureaucracy—narrow, partisan or inexpert—is grossly injurious; it not only fails of the immediate purpose of the law and is opposed to traditions which, happily, are still honoured, but its failure creates a feeling of discouragement bordering on pessimism which forms the most serious obstacle to real improvements in the adjustment of governmental methods to new exigencies.

The standards which he felt should control the action of these commissions and the workable relation of the courts thereto, were likewise pointed out by Justice Hughes in the same address. Declaring that "the tendency to assign to the courts administrative duties which do not belong to them" is "opposed to a proper conception of the function of the Courts," he continued:

Legislation of the first sort undoubtedly arises from distrust of powerful administrative agencies; it shows a desire to escape their authority and to have the judgment of judicial tribunals, with whose standards the public is familiar, in the final decision of difficult administrative problems. It seems to me to be the wrong way to reach the right result. The only reason for the creation of the new administrative instrumentalities—which appear to present government in a new phase—is the complexity

of the facts with which government undertakes to deal and the necessity, if they are wisely dealt with, for the continuous and expert attention of a body exclusively concerned with the particular subject. To put upon the courts the burden of considering the details of administrative problems would be to overwhelm them; but for the courts to revise and rescind administrative action without a competent and close study of all the pertinent facts would be not only to destroy the effectiveness of the administrative agencies, but also seriously to impair the confidence reposed in judicial tribunals. It cannot be too strongly insisted that if we are to have these important administrative instrumentalities properly perform their duty, they should stand on their own footing, and that the public should realise that their safeguard is not in injecting the courts into the work of administration, to the confusion of both, but in maintaining an enlightened policy and in insisting upon proper standards of official conduct. The courts cannot be substituted for administrative agencies; nor, as I believe, is it to the ultimate advantage of the community to divide between them the responsibility for purely administrative action.

This is not to say that the courts do not have a very important function in connection with the work of administrative commissions. These bodies exercise prescribed powers, and the limits of these powers, as well as constitutional restrictions, must be defined and maintained by judicial tribunals. There is thus interposed one of the most important safeguards of the com-

munity against all efforts on the part of administrative agents to draw to themselves powers not conferred, and on the other hand, the appropriate demand, intelligently enforced, for the proper execution of the law, does not in any way sacrifice administrative efficiency. Rather it tends to conserve such efficiency by avoiding the reactions which inevitably follow abuses of authority. There is also apparent at times the tendency, in a desire for the play of administrative discretion, to preserve opportunities for arbitrary action without responsibility. The requirement of a fair hearing, of action upon evidence, of a disclosure of the basis of action that all parties interested may have suitable opportunity to challenge it, in no way trammels the just administrator who is loyal to the standards of democracy, but are very important safeguards against the development of bureaucratic despotism under democratic forms.

CHAPTER XV

THE MAN WHO BROKE HIS WRITTEN CONTRACT WITHOUT REPAYING HIS EMPLOYER WHAT HE HAD BORROWED

In *Bailey* against *Alabama*,[1] decided by the Supreme Court in January of 1911, Justice Hughes was called upon to declare whether vital principles of freedom, which under ordinary industrial conditions would be recognised as fundamental in the relationship of employer and employé, might be put aside by a State perplexed by the conditions which have arisen as to farm labour in many of the plantation districts of the South.

The State of Alabama had tried to make a little more effective the legislation it already had, along lines and for purposes by no means unusual, in either North or South. The question was whether this amendment went too far. The difficulty sought to be remedied was that employés of an irresponsible and more or less wandering type often go around and make written contracts with plantation owners, whereby they hire out for a year; they do this with no intention of remaining at work and with inten-

[1] 219 U. S. Reports, page 219.

tion only of "getting something for nothing" from the employer; they obtain advances of moneys or supplies on account of their prospective services or as an initial payment under the contract; and then when the season of dire need for their labour in the fields comes on, they disappear or do nothing, leaving the employer possessed of a written contract but "out" both money and farm hands. There would be no use suing for the money, and no way of compelling the man to work as he had agreed. The State thought it was a reasonable thing to draft the most effective law that could be perfected, under the Constitution and the American way of doing things, to protect employing owners against this kind of fraud. So the State legislators kept experimenting on their form of statute, making it a little more drastic from time to time, as the need became greater and new provisions suggested themselves. Now and then they encountered difficulties with their own State Supreme Court,[1] but matters worked along until finally they passed an amendment under which the mere failure to perform a contract to work for a specified time, coupled with a failure to pay a debt for advances which were to be liquidated during the contract period, would, if shown in court, be sufficient evidence to warrant the conviction of the defaulting em-

[1] *Toney* vs. *The State* (141 Alabama Reports, page 120); *Ex parte* Riley (94 Alabama Reports, page 82); *Bailey* vs. *The State* (158 Alabama Reports, page 25).

ployé of a criminal offence, for which, in the case of Bailey, punishment was inflicted in the form of sentence for one hundred and sixteen days at hard labour, in lieu of his prompt payment of a fine amounting to twice the sum of fifteen dollars, which he owed his former employer, together with the costs.

There was no question as to the power of any State to provide that any person who, with intent to injure or defraud his employer, entered into a written contract to work for him and thereby obtained from his employer money or other personal property, and then with like intent and without just cause and without refunding the money or paying for the property refused to perform the contract, should be punished as if he had stolen it. Such a rule of law obtains in many jurisdictions, and has not been challenged by the Federal Court. Alabama had such a statute, enacted in 1896. Under it, when it appeared from all the circumstances that the defaulting employé entered into the contract with the intent not to perform it but to use it as means of getting money or otherwise defrauding the employer, failure to repay and refusal to perform subjected him to criminal liability, if his non-performance was without just cause and with like intent to injure and defraud the man for whom he had promised to work. "The difficulty in proving the intent, made patent by the decision" of the Alabama Supreme Court as to the essential elements of this statu-

tory offence, "suggested the amendment of 1903," which, as amplified in 1907, was before the United States Supreme Court in the *Bailey* case.

This amendment made refusal or failure to perform the service, or to refund the money or pay for the property, if the employé quit work without just cause before the contract time was up, *prima facie* evidence of the intent to injure or defraud the employer. Under a rule of evidence enforced in Alabama as to oral testimony rebutting or contradicting a statutory presumption, an accused person is not permitted to testify "as to his uncommunicated motives, purpose or intention," so that the practical effect of the statute was to empower the jury to convict and the appellate courts to sustain conviction, if it appeared that the accused had without just cause broken a written contract of employment and had failed to repay money which he had been expected to repay out of the proceeds of the employment.

Of course, in New York City, for example, if the employer who made a written contract for a year with a salesman and advanced him money on account of his anticipated earnings, could hale the salesman into the criminal courts when the salesman unwarrantedly left the employment without repaying the moneys advanced, and then could obtain the conviction of the salesman and his sentence to hard labour merely upon proof of the broken contract and

the moneys unrepaid, legislature and courts alike would make short shrift of any statute which authorised such a proceeding, especially if conviction meant so large a fine as virtually to compel the man to work the rest of the year or languish in jail. The matter presents a serious question at all only when urged in the light of conditions in plantation districts of Southern States. As incumbent of a judicial office, Justice Hughes ruled promptly that questions of a racial or sectional character could not be permitted to enter into the judicial disposition of the case.

"We at once dismiss from consideration," said he, "the fact that the plaintiff in error is a black man. While the action of a State through its officers charged with the administration of a law, fair in appearance, may be of such a character as to constitute a denial of the equal protection of laws, such a conclusion is here neither required nor justified. The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho. Opportunities for coercion and oppression, in varying circumstances, exist in all parts of the Union, and the citizens of all the States are interested in the maintenance of the constitutional guaranties, the consideration of which is here involved."

The opinion proceeds with an analysis of the provisions of the statute and its practical workings:

Was not the case the same in effect as if the statute had made it a criminal offence to leave the service without just cause and without liquidating the debt? To say that he has been found guilty of an intent to injure or defraud his employer, and not merely for breaking his contract and not paying his debt, is a distinction without a difference to Bailey.

Consider the situation of the accused under this statutory presumption. If at the outset nothing took place but the making of the contract and the receipt of the money, he could show nothing else. If there was no legal justification for his leaving his employment, he could show none. If he had not paid the debt there was nothing to be said as to that. The law of the State did not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence affirmatively showing good faith, he was helpless. He stood, stripped by the statute of his presumption of innocence, and exposed to conviction for fraud upon evidence only of breach of contract and failure to pay. . . .

We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way

to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional.

Upon the question whether the statute as actually operative offended against constitutional guaranties, Justice Hughes continued:

In this class of cases, where the entire subject-matter of the legislation is otherwise within State control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution or subject an accused to conviction for conduct which it is powerless to prescribe.

In the present case it is urged that the statute as amended, through the operation of the presumption for which it provides, violates the

Thirteenth Amendment of the Constitution of the United States and the act of Congress passed for its enforcement.

The Thirteenth Amendment provides:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation." . . .

The language of the Thirteenth Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was with African slavery, the Amendment was not limited to that. *It was a charter of universal civil freedom for all persons, of whatever race, colour or estate, under the flag.*

The words involuntary servitude have "a larger meaning than slavery." "It was very well understood that in the form of apprenticeship for long terms, as it had been practised in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used." (*Slaughter House Cases,* 16 Wall. p. 69.) The plain intention was to abolish slavery of whatever name and form and all its

badges and incidents; to render impossible any state of bondage; to make labour free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude. . . .

The act of March 2, 1867, was a valid exercise of this express authority. It declared that all laws of any State, by virtue of which any attempt should be made "to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service of labour of any persons as peons, in liquidation of any debt or obligation, or otherwise," should be null and void.

Peonage is a term descriptive of a condition which has existed in Spanish America, and especially in Mexico. The essence of the thing is compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid. And in this explicit and comprehensive enactment, Congress was not concerned with mere names or manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained or enforced.

The fact that the debtor contracted to perform the labour which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory

service. It is the compulsion of the service that the statute inhibits, for when that occurs the condition of servitude is created, which would be not less voluntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labour. . . .

The act of Congress, nullifying all State laws by which it should be attempted to enforce the "service or labour of any persons or peons, in liquidation of any debt or obligation, or otherwise," necessarily embraces all legislation which seeks to compel the service or labour by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion. The Thirteenth Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labour for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.

If the statute in this case had authorised the employing company to seize the debtor and hold him to the service until he paid the fifteen dollars, or had furnished the equivalent in labour,

its invalidity would not be questioned. It would be equally clear that the State could not authorise its constabulary to prevent the servant from escaping and to force him to work out his debt. But the State could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorise the use of physical force. "In contemplation of the law the compulsion of such service by the fear of punishment under a criminal statute is more powerful than any guard which the employer could station."

What the State may not do directly, it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory compulsion which upon proof of no other fact exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question, and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labour upon which alone can enduring prosperity be based. The provisions designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort and to hold over the heads of the labourers the threat of punishment for crime,

under the name of fraud but merely upon evidence of failure to work out their debts. The act of Congress deprives of effect all legislative measures of any State through which directly or indirectly the prohibited thing, to wit, compulsory service to secure the payment of a debt, may be established or maintained; and we conclude that Sec. 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property received, *prima facie* evidence of the commission of the crime which the section defines, is in conflict with the Thirteenth Amendment and the legislation authorised by that Amendment, and is therefore invalid.

It may be unfortunate and regrettable that the State of Alabama could not continue this particular method of dealing with a situation which its legislature long deemed serious. On the other hand, it may be better, in the long run, for the people of that State and all the States, that even an apparent need was not permitted to warp or weaken a fundamental which may some day be acclaimed as of imperishable value. With the expediency of the enforcement or the abrogation of the legislation, the Supreme Court and Justice Hughes of course had no concern. Sworn to defend the Constitution and apply the law, they had only to answer the question whether the amendment in its actual workings brought about results which the Constitution and statutes were de-

signed to prevent. Was Justice Hughes right or wrong in his analysis of actual workings? If right, then the appeal for withdrawal of the barriers to this Alabama legislation must be made at least to the Congress which, after all the years, still keeps in force the old "peonage statute" of 1867. The President and Congress, not the Supreme Court, have continued on the statute books the 1867 enactment under which the Alabama statute was held unconstitutional, by Chief Justice White of Louisiana, as well as Justice Hughes of New York.

CHAPTER XVI

AMERICA AND THE IMMIGRANT OF TO-DAY AND YESTERDAY

Notably as Governor of New York, Mr. Hughes had taken a deep and active interest in proposals for bettering, within acceptable lines, the conditions under which newcomers to American shores make their start in the industrial and social life of their adopted land. A Commission of notable experts and humanitarians was created, upon his recommendation, in 1908; this body reported a comprehensive series of constructive measures in 1910, which he in turn commended to the favourable consideration of the Legislature; and in consequence, New York was first in putting in effect many of those measures for State co-operation in the "Americanisation" and better distribution of immigrants, which have subsequently been endorsed by most of those who have given the subject careful study. Said Governor Hughes at that time:

Our laws should be adapted to meet the exigency which arises from the introduction of so many into our population who are unfamiliar with our usages and laws and are the ready vic-

tims of manifold impositions. We cannot afford to regard with cynical indifference the condition and opportunities of those who have recently come to us from foreign lands, and we should be solicitous to make such improvement in our laws and administration as will reach the special abuses which have been found to exist. It should be considered to what extent they may be reached through existing governmental agencies and how far it may be necessary to improve these agencies to ensure practical correction. It is desirable that there should be legislation imposing more effective restrictions upon the business of private individuals who receive deposits of money in small sums.[1] The condition of labour camps in connection with public works should also receive proper attention. The importance of suitable vital statistics and of public records of aliens remaining in our State should be recognised, and it should also be considered whether it is not feasible to adopt some means to promote their better distribution.

As early as October 19, 1907, in an address at the dedication of a statue erected in memory of a distinguished citizen of foreign extraction,

[1] In *Engel* vs. *O'Malley* (219 U. S. Reports, page 128), the Court upheld the constitutionality, under the "police power," of the banking legislation enacted in pursuance of this recommendation by Governor Hughes. The statute was upheld largely on the ground that it placed needed safeguards around the relations between "private bankers," who accepted sums largely for transmission abroad, and "newly arrived immigrants," as yet unaccustomed to the business practices of a strange, new country.

he had indicated his mode of approach to the problems of an unqualified Americanism:

Fortunate also is it that we are becoming more and more free from racial and provincial prejudices, and are able to make a truer estimate of the many sources from which we have derived our National strength and the virtues of our citizenship. It is a pleasant thought, which frequently has been expressed, that the ancestors of most of those who settled the country in colonial days once lived in the German forests; and we witness here, on a large scale, and after centuries of varied experience, what is virtually a reuniting of the descendants of a common stock. But however pleasing this may be to the historical imagination, our unity in fact is not racial and does not depend upon blood relationship, whether near or remote. It is the unity of a common National ideal; it is the unity of a common conception of the dignity of manhood; it is the unity of a common recognition of equal civil rights; it is unity in devotion to liberty expressed in institutions designed to give every man a fair opportunity for the exercise of his talents and to make the activities of each subordinate to the welfare of all. To the maintenance of this ideal and to the fulfilment of the purposes of our National organisation, each race has made its contribution. And we are not truly Americans if we do not greatly rejoice in the fact that here is more than the work of any one people, and more than the product of any one experience; that to the making and to the prosperity of this com-

monwealth humanity has given of its best; and that its vigour and unprecedented strength are due in no small degree to the fusion of its diverse elements. . . .

This is our common country. Whatever the abode of our ancestors, this is our home and will be the home of our children, and in our love for our institutions, and in our desire to maintain the standards of civic conduct which are essential to their perpetuity, we recognise no difference in race or creed—we stand united, a contented people rejoicing in the privileges and determined to meet the responsibilities of American citizenship.

In view of the part which, as Governor of New York, he had taken in awakening public thought and effort in behalf of a more patriotic handling of governmental responsibilities towards newcomers to this country, it was perhaps more than coincidence that in the Supreme Court he was called upon to prepare the opinion of the Court in several important cases where the rights of immigrants were at stake. For example, at the end of 1914, the voters of Arizona had utilised the initiative provision of their State Constitution to put in force a measure which was frankly called "an act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona, and to provide penalties and punishment for the violation thereof." The Act itself required every employer

of more than five persons, "regardless of kind or class of work, or sex of workers," to "employ not less than eighty per cent. qualified electors or native-born citizens of the United States or some sub-division thereof." A man named Raich was working in a restaurant conducted by one Truax, in Bisbee, Arizona. He had been born in Austria and had not yet been naturalised. Of his eight fellow employés, only two were either "native-born" citizens of the United States or qualified electors. When the Act went into effect, Truax was afraid of its penalties, told Raich so, and discharged him.

Raich took the case into Court.[1] He said that inasmuch as the United States had admitted him into the country, the United States ought not to permit any State to create arbitrary conditions preventing his continuance in employment here; that if under the laws an alien was entitled to come in and live here, he was entitled to have no legal barriers put in the way of his purpose to earn here a livelihood. Accordingly he asked the Supreme Court to sanction an injunction restraining the enforcement of the statute, on the ground that it denied to him the "equal protection of the laws." The Court, through Justice Hughes, held that the State statute did go too far and operated to deny to non-naturalised inhabitants of Arizona essential rights to which they were fairly entitled

[1] *Truax* vs. *Raich* (239 U. S. Reports, page 33).

under the American form of government. Said the opinion read by Justice Hughes:

The complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union. . . . Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description —"any person within its jurisdiction"—as it has frequently been held, includes aliens. "These provisions," said the Court in *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the Amendment), "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of colour, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." See also *Wong Wing* v. *United States,* 163 U. S. 228, 242; *United States* v. *Wong Kim Ark,* 169 U. S. 649, 695. The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. . . . It should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is

imposed upon the conduct of ordinary private enterprise.

As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the businesses described. Literally, its terms might be taken to include with aliens those naturalised citizens who by reason of change of residence might not be at the time qualified electors in any subdivision of the United States, but we are dealing with the main purpose of the statute, definitely stated, in the execution of which the complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien.

It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is

argued, that the act proceeds upon the assumption that "the employment of aliens unless restrained was a peril to the public welfare." The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labour is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

It is insisted that the act should be supported because it is not "a total deprivation of the right of the alien to labour"; that is, the restriction is limited to those businesses in

which more than five workers are employed, and to the ratio fixed. It is emphasised that the employer in any line of business who employs more than five workers may employ aliens to the extent of twenty per cent. of his employés. But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. If the restriction to twenty per cent. now imposed is maintainable, the State undoubtedly has the power if it sees fit to make the percentage less. We have nothing before us to justify the limitation to twenty per cent. save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent. of the employés to be aliens or even a less percentage, or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognise degrees of evil and adapt its legislation accordingly; but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect

to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law.

On the other hand, the Court has manifested no disposition to sanction misuse of the high privileges of citizenship through naturalisation or to withhold from American citizens the preferences which may be accorded them along lines consonant with fundamental rights. It unanimously affirmed [1] the cancellation of a naturalisation certificate obtained by one Luria, where it appeared that "Luria did not at the time intend to become a permanent citizen of the United States, but only to obtain the indicia of such citizenship in order that he might enjoy its advantages and protection and yet take up and maintain a permanent residence in a foreign country." There is a fine summary of the fundamentals of the obligations of naturalised citizenship in this opinion, joined in by Justice Hughes and his colleagues on October 20, 1913:

Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on

[1] *Luria* vs. *U. S.* (231 U. S. Reports, page 9).

the part of the society. These are reciprocal obligations, one being a compensation for the other. Under our Constitution, a naturalised citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency. Turning to the naturalisation laws preceding the act of 1906, being those under which Luria obtained his certificate, we find that they required, first, that the alien, after coming to this country, should declare on oath, before a court or its clerk, that it was *bona fide* his intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign sovereignty; second, that at least two years should elapse between the making of that declaration and his application for admission to citizenship; third, that as a condition to his admission the court should be satisfied, through the testimony of citizens, that he had resided within the United States five years at least, and that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and, fourth, that at the time of his admission he should declare on oath that he would support the Constitution of the United States and that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign sovereignty. These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status

as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told in the past.

By the clearest implication those laws show that it was not intended that naturalisation could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his naturalisation as a shield against the imposition of duties there, while in his absence he was avoiding his duties here. Naturalisation secured with such a purpose was wanting in one of its most essential elements—good faith on the part of the applicant. It involved a wrongful use of a beneficent law.

The Supreme Court likewise, in *Heim* against *McCall*,[1] decided in November of 1915, held that the State as an employer, in entering into or authorising contracts for the doing of work for which it was to pay, wholly or in part, has a plenary right to prefer its own citizens to aliens without incurring the condemnation of the National or State Constitution. On public works, therefore, the State and its sub-divisions

[1] 239 U. S. Reports, page 175.

have the same power which any employer would have, of his own volition, to give the preference to citizens of the State which is paying for the work. And in *Tang Tun* against *Edsell*,[1] the Supreme Court was asked by a Chinese person who sought entry to the United States, to review and reverse, in effect, a determination of the inspector at the port of application, affirmed by the Secretary of Commerce and Labour, denying to the petitioner the right of admission to this country. The denial of admission was on the ground that, under all of the circumstances, Tang Tun had not sufficiently established his American citizenship, as was necessary were he to be entitled to pass the barriers of the Exclusion Act. The United States District Court, upon Tang Tun's application for a writ of *habeas corpus* after the Secretary of Commerce and Labour had sustained the action of the local immigration officials, decided that Tang Tun was entitled to come in, and so reversed the order of the inspector "on the spot." The Circuit Court of Appeals and the Supreme Court were of the opinion that all the requirements of fair hearing and open-minded decision had been fulfilled by the local officers, and that there was no ground for judicial interference with their salutary discretion, based on first-hand information and observation.

"If it does not affirmatively appear," said Justice Hughes, in construing the applicable

[1] 223 U. S. Reports, page 673.

statutes, "that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship must be deemed to be conclusive and is not subject to review by the Court. . . . The record fails to show that their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. And, this being so, the merits of the case were not open to judicial examination."

CHAPTER XVII

THE COURTS AS "EXPERT AGENTS OF DEMOCRACY"

In the address which he delivered before the New York State Bar Association last January, Justice Hughes discussed phases of the work of the courts, and indicated lines along which the constructive statesmanship of the future, on the bench and in legislative councils, may proceed in obtaining a better organisation and adjustment of the American judicial system. His statement of the standards which should prevail in the interpretation of statutes will long be quoted as a classic exposition of the judicial function in a democracy and of the forward-looking spirit which has come more and more to pervade the law:

I like to think of the courts as in the truest sense the expert agents of democracy, expressing deliberate judgment under conditions essential to stability, and therefore in their proper action the necessary instrumentalities of progress. We are constantly reminded of the fact that legislation, even when making important changes, is new only in part. It cannot escape its roots. In providing what is new, it also brings forward what is old. Concepts long fa-

miliar in the law are introduced into new statutes; language can hardly be used otherwise, despite crudities in drafting, and in nearly every line is a connection with the past which demands the expert judicial interpreter. And further, what may seem at the time to be an abrupt or catastrophic change takes ultimately its place in legal history, when causes and effects are better understood, as a natural evolution. It is undoubtedly the duty of the courts to construe legislation according to the intent of the Legislature. But the question remains, What is the intent of the Legislature? The man in the street will tell you at once what it is, but when you put the case to him in its details he hesitates. What seemed clear becomes doubtful as the particular application to concrete facts is faced. Much that arises in the controversies which the courts must decide was not or could not have been foreseen and actual intent to deal with it was lacking. There is no one who has had anything to do with legislation but knows how various are the views inducing votes, and it is recognised that it would be highly unsafe to take even expressions in debate as representing the opinions of others whose concurrence was necessary to the passage of the measure. The intent of the Legislature is sometimes little more than a useful legal fiction, save as it describes in a general way certain outstanding purposes which no one disputes, but which are frequently of little aid in dealing with the precise points presented in litigation. Moreover, legislative ambiguity may at times not be wholly unintentional. It is

not to be forgotten that important legislation sometimes shows the effect of compromises which have been induced by exigencies in its progress, and phrases with a convenient vagueness are referred to the courts for appropriate delimitation, each group interested in the measure contending that the language adopted embodies its views. Legislation does not execute itself; very rarely does it fully explain itself; and with the legislative word, in order to make it effective, must go the judicial judgment. How important this work is in connection with recent legislation is at once apparent. For it is through the courts that consistency and symmetry will be given to new departments of law.

I have said that every statute shows its connection with the past and contains in its language references to familiar legal concepts, but the work of interpretation cannot faithfully be performed in a technical spirit which would sacrifice the growing substance of the law to a lifeless formalism. Nor can it in linking the future with the past ignore the evident purpose of many legislative changes. Thus, in the case of our Uniform State Laws, formulated and adopted with the purpose of unifying the commercial law of the country, nothing could be more lamentable than to treat the Uniform Act as an outgrowth of the separate law of the State and through conflicting interpretations to create a new diversity in place of the desired unity. It is an old maxim that in construing statutes the court should consider the old law, the mischief and the remedy. The maxim has

become so hackneyed that its fine quality is often not perceived. It calls for a statesmanlike appreciation of past, present and future, through which alone the judge can meet his responsibilities as the interpreter of legislation in the expanding life of democracy. In judicial tribunals, the Legislature is happily, though somewhat mythically, personified as possessed of all accessible information, learned in the law of the past, wise to the point of infallibility in matters of legislative discretion, generally using legal language with legal acumen and certainty and imbued with the spirit of unfailing consistency. The intent of this ideal legislative intelligence is found in the words it employs, and when found must be faithfully applied; and the general success of the courts in this arduous endeavour is shown by the fact that although the Legislature is always free to repudiate any misconstruction of its purpose, such action is rarely taken.

"A tendency . . . opposed to a proper conception of the function of the Courts," in the opinion of Justice Hughes, is that

. . . which denies to judges the authority which would seem to be needed for the efficient discharge of judicial duty. Thus in some jurisdictions the freedom of the judge in instructing the jury is very considerably curtailed in a manner which betrays a regrettable distrust. This of course carries the lesson of the extreme importance of such conduct on the part of our judges as will commend their office to the com-

munity they serve. But I venture to say that no intelligent citizen has ever taken part as a juryman in a trial over which presided a thoroughly competent judge, who swiftly, fairly and firmly applied the law, extricating the essential merits of the controversy from the confusing details of testimony and argument, without profound respect for the expert knowledge and trained capacity which successfully meets a test so severe. There can be no respect for the law without competent administration, and there can be no competent administration without adequate power. We shall never rise to our opportunities in this country and secure a proper discharge of the public business until we get over our dislike of experts; and the difficulties in the way of needed improvements in the administration of justice will not be overcome by tying the hands of those most competent to deal with them.

On the vital topic of betterment in the mechanics of court procedure, Justice Hughes continued by saying:

And this leads me to speak briefly, in conclusion, of the urgent needs of reform in judicial procedure. If I may be permitted to speak with the liberty of a member of this association, I am very glad that at last the time has arrived when we may reasonably expect radical changes in our procedural law. We have very unnecessary differences with respect to different courts. The essentials of procedure are simple, and they should conform to one simple type,

with only such modifications as are necessary to adapt it to differences in jurisdiction. We have become accustomed to a network of legislative rules of practice which in their complexity are a reproach to the State. The remedy, I believe, is to replace these rules with a few statutory provisions forming the basis of procedure, leaving all the details to be supplied by rules of court. The important equity practice of the Federal courts of the country is governed without difficulty by a few rules promulgated by the Supreme Court. There is no other way, it seems to me, to give the requisite simplicity and elasticity to procedure. There may be a prejudice among lawyers to committing this power to the Bench, because of the fear that rules of practice will be removed from the range of the just influence of the Bar. This I think is a misapprehension. It would be far easier to convince a court of the necessity of a change in its rules than to convince the Legislature, while, on the other hand, unnecessary tinkering would be made more difficult. When the Federal equity rules were adopted committees of lawyers were appointed through the circuit judges of each circuit, and thus the expert opinion of the entire country was obtained, to the great advantage of those engaged in formulating the rules. Instead of being withdrawn from the influence of lawyers, the regulation of practice by rules of court would permit that influence to be exerted in the most intelligent manner. Proposed changes would emerge from the discussions of Bar associations and would be presented finally to those who were most sensi-

tive to professional opinion and most competent, by reason of constant experience, to pass upon the questions submitted. In this way the rigidity of statutory enactments will be avoided and judicial procedure will cease to be the mere sport of those whose game is to avoid decisions on the merits.

Justice in the minor courts—the only courts that millions of our people know—administered without favouritism by men conspicuous for wisdom and probity is the best assurance of respect for our institutions. The administration of commercial law by recognised experts in a direct fashion appropriate to the subject is needed quite as much as uniform State acts to commend the law to practical men of affairs. The stripping of criminal procedure of needless requirements, without impairing the security of innocence, and in general the fearless destruction of provisions which only embarrass the just disposition of controversies, should not be long delayed.

Quotation at length from this address has seemed warranted, because these excerpts reveal, more accurately than anything except a detailed examination of many volumes of the official reports by a trained legal mind could do, the spirit which seemed to dominate and distinguish the public service of Mr. Hughes in the Supreme Court. To him, the law was a vital, reasonable, living instrumentality—not an end in itself, not a tradition to be cherished or preserved for its own sake—not a substi-

tute for the mature judgment of the people, but their "living voice," and the courts their most expert aid and accurate expositor. As it seems that he saw it, an accused person should be assured, at every cost and hazard, every essential of a fair trial on the merits, with the full benefit of every proper presumption; but the public also had rights—the right, as he stated it,[1] "at all times to take proper measures to prevent the perversion of its legal machinery"; the right to see to it that no subterfuges and artifices and no incidents of trial[2] that stop short of actual prejudice, are permitted either to defeat or delay a just determination on the real merits; the right to go forward and put in force such new, direct and humanitarian methods of administration as a patient experience from time to time shows to be consonant with the fundamentals of fair adjudication.

He could not accept the contention that the Fourteenth Amendment, with its requirement of "due process" coming down from the conflicts of European tyrannies, fastened upon this day and generation the precise methods, formulæ, institutions, or procedural concepts which were held when our Constitutions were

[1] *Fraternal Mystic Circle* vs. *Snyder* (227 U. S. Reports, page 503).

[2] *Illinois Cent. R. R. Co.* vs. *Skaggs* (240 U. S. Reports, page 66); *Herencia* vs. *Guzman* (219 U. S. Reports, page 44); *Norfolk & W. Ry. Co.* vs. *Holbrook* (235 U. S. Reports, page 625).

adopted. In *Graham* against *West Virginia*,[1] the Supreme Court was asked to condemn, under the "due process" clause, a West Virginia statute based upon some recommendations of what is referred to as "the new penology." The statute provided a new system for the identification of "second offenders"; it made a start in the direction of a better way of ascertaining the identity and separately determining the guilt of those who had been hitherto convicted of crime. Mr. Justice Hughes brushed aside the contention that this withheld "due process" or denied "the equal protection of the laws," saying:

The Fourteenth Amendment is not to be construed "as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment." . . . A State may make different arrangements for trials under different circumstances of even the same class of offences . . . and certainly it may suitably adapt to the exigency the method of determining whether a person found guilty of crime has previously been convicted of other offences. All who were in like case with the plaintiff in error were subject to the same procedure. He belonged to a class of persons convicted and sentenced to the penitentiary whose identity as former convicts had not been determined at the time of their trial. As to these, it was competent for

[1] 224 U. S. Reports, page 616.

the State to provide appropriate means for determining such identity.

He was impatient with suggestion that the Constitution should be construed to prevent the punishment of men whom a fair trial would send to punishment, unless such construction were successfully invoked in their behalf. "The Constitution of the United States is not intended as a facility for crime," declared he with vehemence, in *Brown* against *Elliott*,[1] where artful issues of venue and jurisdiction were invoked to forestall the condemnation of men charged with conspiracy to defraud. "It is intended to prevent oppression, and its letter and spirit are satisfied if, where a criminal purpose is executed, the criminal purpose is punished."

His inclinations seemed, in fairness, to be ever to give a construction to statutes which would ensure their efficacy for the intended purposes and enable legal machinery to cut directly through to a determination of the merits under all the existent and relevant facts. He was not impressed with ingenious reasons why those accused of crimes against the public rights should be permitted, in effect, to withhold books and papers which would have important bearing upon the question of their innocence or guilt in fact. All he wanted was the eliciting of the *facts*, and then a fair determination on the facts

[1] 225 U. S. Reports, page 402.

and law. When Christopher C. Wilson, versatile president of the United Wireless Company of Maine and the universe, was indicted for fraudulent use of the mails, among other things, the Federal Grand Jury, in the course of its continued investigations, developed a pardonable interest as to the contents of the books of the corporation in very pertinent respects. Wilson was subpœnaed to produce them, and his able counel developed a multitude of artificial reasons why the books should not be disclosed to the matter-of-fact curiosity of a grand jury seeking whom else it ought to indict on United Wireless transactions. In this and similar cases,[1] Justice Hughes made short shrift of objections. In the *Wilson* case, he said:

The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violation of law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a

[1] *Wilson* vs. *U. S.* (221 U. S. Reports, page 361); *Dreier* vs. *U. S.* (221 U. S. Reports, page 394); *Grant* vs. *U. S.* (227 U. S. Reports, page 74); *American Lithograph Co.* vs. *Werckmeister* (221 U. S. Reports, page 603).

recognition, but an unjustifiable extension, of the personal rights they enjoy. They may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.

Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. That, if the corporation had been so charged, he would have been compelled to submit the books to inspection, despite the consequences to himself, sufficiently shows the absence of any basis for a claim on his part of personal privilege as to them; it could not depend upon the question whether or not another was accused. The only question was whether as against the corporation the books were lawfully required in the administration of justice. When the appellant became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any de-

mand of government which the corporation was bound to recognise.

In *Arizona & New Mexico Ry. Co.* against *Clark*,[1] a verdict had been obtained in a negligence action, after a trial on which the plaintiff testified freely and at length regarding his bodily condition, and also called his nurse as a witness in his behalf, on the question of the extent of his injuries. His testimony covered the time when he was under a doctor's care, and the defendant sought subsequently to introduce the doctor's testimony as to the conditions which he found, upon examinations of the plaintiff and during treatment. Upon the plaintiff's objection, the trial court refused to let the jury have the benefit of the doctor's testimony, on the ground that an Arizona statute provided that "a physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient . . . or any knowledge obtained by a personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician."

The majority of the Supreme Court held that, despite the testimony of the plaintiff and his nurse, there was no waiver of the plaintiff's right to restrain his physician from tes-

[1] 235 U. S. Reports, page 669.

tifying as to "knowledge obtained by a personal examination of such patient." The minority of the Court did not think this ruling conduced to giving the jury fairly the benefit of the facts, and so, in an opinion written by Justice Hughes, they declared:

It should be supposed that it was the legislative intent to protect the patient in preserving secrecy with respect to his ailments and not to give him a monopoly of testimony as to his condition while under treatment. . . . To permit him, while thus disclosing his physical disorders (through the testimony of himself and his nurse), to claim a privilege in order to protect himself from contradiction by his physician as to the same matter, would be, as it seems to me, so inconsistent with the proper administration of justice that we are not at liberty to find a warrant for this procedure in the statute unless its language prohibits any other construction.

In *City of Memphis* against the *Cumberland Telephone and Telegraph Company,*[1] what seemed to be technicalities of procedure and the record were invoked to sustain a result far short of a determination on the merits of the question really at issue, and Justice Hughes aligned himself again with a minority of the Court in behalf of what seemed to him the rule more in accord with the fair meaning of the statute and the public rights involved. The

[1] 218 U. S. Reports, page 624.

Circuit Court had enjoined the enforcement of an ordinance of the City of Memphis which sought to regulate the telephone rates charged by the complainant company. The bill for injunction had alleged that the ordinances and rates complained of were unauthorised and illegal, and were discriminatory and confiscatory; the opinion of the Circuit Court stated that the result of the ordinances was "destructive of the complainant's rights under the Federal Constitution"; and the enforcement of the ordinances was halted. On the appeal of the City to the Supreme Court, counsel for the company successfully urged that the allegations of the bill must be construed as referring only to the State Constitution and that nothing in the record showed that a Federal question had been passed upon or was presented by the bill filed by the company. Therefore it was concluded that there was no jurisdiction or basis for the taking of jurisdiction by the Supreme Court to review the action of the Federal Court, there being no "Federal question" involved, and the appeal was dismissed. Thereby was continued in effect the injunction, based wholly or in part upon the Federal Constitution, as the opinion of the Court would have disclosed, had the majority felt that they had a right to read the opinion in order to learn the basis on which the injunction had been granted below.

Justice Hughes was one of the minority judges who felt that it was absurd for the Su-

preme Court to refuse, on the ground that no Federal question was involved, to consider the correctness of a decision by the Circuit Court that the ordinances enjoined were "destructive of the complainant's rights under the Federal Constitution" and were accordingly to be enjoined. The minority contended that the opinion below, as well as the bill, was a part of the record, and could be freely consulted, in good sense, to see if a reviewable issue was in fact decided below. Where the Court below had enjoined the enforcement of a municipal ordinance by deciding a question of Federal constitutionality and right adversely to the municipality, the minority thought that the Supreme Court had power and duty to review and correct the error committed by the Court below and dissolve the injunction, regardless whether such error arose from a wrong decision of the Federal question actually passed upon or from a mistake in assuming that the Federal question was before it for decision.

The most notable opinion which Justice Hughes prepared upon a procedural and law-reform topic was in *Slocum* against the *New York Life Insurance Company*.[1] It was a dissenting opinion, and with him concurred Justices Holmes, Lurton and Pitney. The question came up in this manner: The plaintiff had recovered a verdict on a life insurance policy, after trial in a Federal Court in Pennsylvania,

[1] 228 U. S. Reports, page 364.

before the Court and a jury. On appeal, the central issue in the case, as to whether the policy was in law and fact in force at the time of the death of the insured, was determined in the negative by the Circuit Court of Appeals. In consequence, it became certain that in no event could the plaintiff recover upon the policy in suit, and that a repetition of the trial would be only a waste of time for the litigants and a burden upon those who pay the revenues which maintain the Courts. Under one of the "practical reforms" instituted in the Pennsylvania State Courts [1] "for facilitating business without impairing settled legal principles," a State appellate Court was authorised, where it appeared clearly that the plaintiff could not, as a matter of law, possibly recover as result of a re-trial of the case, to end the matter and avoid further expense, by directing then and there the ultimate verdict which would be inevitable if the case went back for re-trial nominally before a jury, although with no prospect that the case could ever again go to the jury or that another verdict for the plaintiff could possibly stand, under the law of the case as settled by the appellate Court. Under the familiar rules by which Federal Courts within a State are governed by the State procedure and practice as to purely procedural matters, the Circuit Court of Appeals felt authorised to follow in the case at bar the salutary Pennsylvania prac-

[1] *Dalmas* vs. *Kemble* (215 Pa. State Reports, page 410).

tice, and so directed a verdict for the defendant, without sending the case back for re-trial.

A majority of one in the Supreme Court held that under the Seventh Amendment, which assures right of trial by jury in the Federal Courts, there could be no such direction of a verdict by an appellate Court when it reached a decision that the verdict returned by the jury must be set aside and a rule of law declared which will preclude the possibility of the plaintiff's ultimate recovery in the action. The majority of the Court held that trial by jury was a substantial right, and that it included the right to trial before a jury every time the case was to be determined, and that the appellate Court could not, even in the interests of directness and simplicity, itself determine questions of fact.

Four Justices of the Court, for whom Justice Hughes wrote the memorandum of dissent, contended strongly that the Pennsylvania practice was valid and beneficial, and that the Seventh Amendment was no bar to such a procedural reform. Justice Hughes argued earnestly against the majority opinion, on the ground that

> . . . it erects an impassable barrier—unless the Constitution be amended—to action by Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing in a highly important de-

gree the delays and expense of litigation. . . . We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record. I submit, with deference, that in now condemning this practice, long followed in the Courts below, this Court is departing from, instead of applying, the principles of the common law, and is extending rather than enforcing the constitutional provision.

The necessary limitations in the length of this volume have prevented quotation from some of the opinions filed by Justice Hughes and have curtailed comment upon others. In the appendices, however, all of the opinions which he rendered in behalf of the Court, and all of the views expressed by him in dissent from those of the majority of his colleagues, have been summarized, and his entire judicial record may there be scrutinized, in so far as the same is revealed by rendered opinions. It is, of course, as has been said, "an unfortunate feature of public work, in any department, that it is very difficult to interpret it in all its details to the people whose service is being performed"; but it would seem that from the judicial utterances of Justice Hughes there is reflected a view of National life and power which grows and changes through the years and gives ever-suitable vitality to National and State sov-

ereignties alike; a conviction that, as Henry George said, "social reform is not to be secured by noise and shouting; by complaints and denunciation; by the formation of parties or the making of revolutions; but by the awakening of thought and the progress of ideas"; a realization that in this Nation and under the Federal Constitution—a Nation and Constitution composing perhaps the greatest of all human innovations and experiments—the way must be kept ever open for patient, accurate examination of facts as from time to time developed, and then free-spirited following of the facts to their fair conclusions—open also for political and social as well as purely mechanical experimentation and discovery. And we gain also a vision of a day when jurisprudence and statesmanship shall join hands to "put the human factor in the central place" in government, and

"Ring out the feud of rich and poor;
Ring in redress to all mankind."

APPENDIX "A"

TABLE OF OPINIONS WRITTEN BY JUSTICE HUGHES FOR THE COURT

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
Kerfoot v. Farmers' & Merch. Bk.	Argued: Oct. 25, 1910 Decided: Nov. 7, 1910 Reported: 218 U. S. 281	Judgment of Missouri Supreme Court affirmed.	As to the validity of a transfer of real estate to a National Bank for a purpose not authorised by its Charter, *held:* (1) In the absence of a clear expression of the legislative intention, the conveyance was not void, but voidable; (2) the government alone can object, not an heir of grantor; (3) on a writ of error to review the judgment of a State Court, the Supreme Court will not review the State Court's findings of fact as to the acceptance of the deed.
In Re Metropolitan Trust Co.	Argued: Oct. 11, 1910 Decided: Nov. 14, 1910 Reported: 218 U. S. 312	Writ of Mandamus denying the jurisdiction of the Circuit Court granted.	The Circuit Court, after the termination of the term at which a decree is entered, cannot deal with the decree other than for correction of clerical error or inadvertence; and mandamus is the proper remedy where the Circuit Court vacates a

			decree without jurisdiction to do so and refuses to reinstate it.
Eagle Mining & Imp. Co. v. Hamilton	Sub't'd: Nov. 7, 1910 Decided: Nov. 28, 1910 Reported: 218 U. S. 513	Judgment of Supreme Court of New Mexico affirmed.	The findings of fact support the judgment at bar, and no rulings on questions of evidence are here presented for review.
U. S. v. Mason	Argued: Oct. 19, 1910 Decided: Nov. 28, 1910 Reported: 218 U. S. 517	Judgment of the Circuit Court sustaining demurrers to counts of indictment affirmed.	The fees and emoluments of a Clerk of a Federal Court are a fund from which he receives his compensation and reimbursement of expenses, and he holds the surplus, not as a trustee, but as a debtor, of the United States.
Illinois Cent. R. R. v. Comm. of Ky.	Argued: Oct. 27, 1910 Decided: Dec. 5, 1910 Reported: 218 U. S. 551	Judgment of Kentucky Court of Appeals sustaining judgment for amount of taxes affirmed.	The particular manner of recording a tax assessment or the kind of book or envelope used for such a record does not establish lack of "due process of law," if the essentials of a suitable and permanent record are preserved.
Herencia v. Guzman	Sub't'd: Nov. 29, 1910 Decided: Dec. 19, 1910 Reported: 219 U. S. 44	Judgment of U. S. District Court for Porto Rico for the plaintiff in action for personal injuries affirmed.	Dissatisfaction with the jury's verdict does not empower the Supreme Court to reverse on a writ of error, if there was evidence proper for the consideration of the jury.

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
Matter of Gregory	Argued: Dec. 5, 1910 Decided: Jan. 3, 1911 Reported: 219 U. S. 210	Petition for a Writ of Habeas Corpus dismissed.	Sections of the Revised Statutes prohibiting and punishing "gift enterprises" within the District of Columbia relate to such enterprises conducted in *any* manner, whether defined in that or a preceding Statute or otherwise; and where the statute itself is valid, it is within the range of judicial consideration to determine whether the acts of the accused fall within the statute, and the judgment of the Court upon that issue is not reviewable by *habeas corpus* proceedings.
Bailey v. Alabama	Argued: Oct. 21, 1910 Decided: Jan. 3, 1911 Reported: 219 U. S. 219	Judgment of Alabama Supreme Court affirming a judgment of conviction in the Montgomery City Court reversed; White, Ch. J. and Harlan, McKenna and Day, JJ. concurring; Holmes, J., writing, and Lurton,	While its immediate concern was African slavery, the Thirteenth Amendment was a charter of universal civil freedom for all persons of whatever race, colour or estate under the flag; the Constitutional prohibition against all control by coercion of the personal service of one man for the benefit of another, cannot be transgressed indirectly, by creating a statutory presumption, any more than by direct

		J., concurring, in dissent.	enactment; and a State cannot compel "involuntary servitude" in carrying out contracts of personal service by making non-performance presumptive evidence of guilt of intent to defraud.
U. S. v. Chamberlain	Argued: Dec. 16, 1910 Decided: Jan. 3, 1911 Reported: 219 U. S. 250	Judgment of Circuit Court of Appeals sustaining demurrer reversed.	Penalties provided for the non-payment of a stamp tax, under the War Revenue Act of 1898, upon the execution of a conveyance, are to be regarded as stipulated to induce payment and penalize delinquency, not as a substitute for payment or an exclusive method of collection.
Chicago, B. & Q. R. R. Co. v. McGuire	Argued: Dec. 6, 1910 Decided: Feb. 20, 1911 Reported: 219 U. S. 549	Judgment of Iowa Supreme Court sustaining verdict for personal injuries affirmed.	Where "police power" legislation has a reasonable relation to an object within governmental authority, the legislative discretion, whether exercised in the form of a regulation or a prohibition of contracts in derogation of such a regulation, is not subject to judicial review; and an Iowa statute prohibiting contracts between railroad companies and their employés limiting the latter's right to recover damages at common law, is constitutional and bars efficacy of a "Relief Department" plan.

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
Dr. Miles Medical Co. v. Park & Sons Co.	Argued: Jan. 5, 1911 Decided: April 3, 1911 Reported: 220 U. S. 373	Judgment of Circuit Court of Appeals affirmed; White, Ch. J., and Harlan, McKenna, Day, Lurton, Van Devanter and Lamar, JJ., concurring; Holmes, J., dissenting.	In determining questions of the lawfulness of restraints of trade and competition, the public interest remains the first consideration, and a system of contracts between a manufacturer and wholesale and retail dealers, by which the manufacturer attempts to control, not merely the prices at which its agents may sell its products, but also the prices for all sales by all dealers, at wholesale or retail, whether purchasers or subpurchasers, thus essentially eliminating competition and fixing the price which the consumer shall pay, is unlawful, even though such contracts relate to proprietary medicines manufactured under a secret process.
Liverpool & L. & Gl. Ins. Co. v. Bd. of Orleans Assess.	Argued: April 19, 1911 Decided: May 15, 1911 Reported: 221 U. S. 346	Judgment of State Court dismissing suit to cancel assessment affirmed.	Jurisdiction of the State of the domicile over the creditor's person does not exclude the power of another State, in which he does business, to tax credits there accruing to him from resident debtors and thereby force him to contribute to the govern-

			ment under whose protection his affairs are conducted.
Orient Ins. Co. v. Bd. of Orleans Assess.	Argued: April 19, 1911 Decided: May 15, 1911 Reported: 221 U. S. 358	Judgment of State Court sustaining assessments affirmed.	Where a State law prescribes a method for reviewing and reducing excessive valuations for taxation, one not availing thereof within the statutory period cannot thereafter attack the assessment as violating "due process."
Wilson v. U. S.	Argued: Mar. 23, 1911 Decided: May 15, 1911 Reported: 221 U. S. 361	Judgment and orders of Circuit Court affirmed; White, Ch. J., and Harlan, Holmes, Day, Lurton, Van Devanter and Lamar concurring; McKenna, J., dissenting.	The provisions of the Fifth Amendment as to self-incrimination apply to private papers, but not to corporate books and papers in the possession of the officer subpœnaed; even though their contents would incriminate him, he must produce them, but need not testify as to them.
Dreier v. U. S.	Argued: Mar. 23, 1911 Decided: May 15, 1911 Reported: 221 U. S. 394	Judgment and orders of Circuit Court affirmed; McKenna, J., on ground of waiver.	An officer of a corporation cannot refuse to produce its books and papers under a *subpœna duces tecum*, on the ground that the contents would tend to incriminate him personally.
Baglin v. Cusenier Co.	Argued: Mar. 15, 1911	Decree in the Circuit	A foreign manufacturer may not, in this country, use the name of the

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
	Decided: May 29, 1911 Reported: 221 U. S. 580	Court amended in certain respects and decree for complainants directed.	place where he manufactures the article to designate the article itself, if that name has been validly registered as a trade-mark here.
American Lithograph Co. v. Werckmeister	Argued: April 10, 1911 Decided: May 29, 1911 Reported: 221 U. S. 603	Judgment of the Circuit Court imposing penalties for infringement affirmed.	A corporation defendant, in a suit to enforce penalties for infringement of copyright, is not entitled under the Fourth or Fifth Amendment to object to the admission of evidence of entries in its books produced under a *subpœna duces tecum*.
Baltimore & O. R. R. Co. v. Int. Com. Com.	Argued: April 18, 1911 Decided: May 29, 1911 Reported: 221 U. S. 612	Decree refusing to annul order of Commission affirmed.	The length of hours of service of railroad employés having a direct relation to the efficiency of the human agencies upon which the safety and protection of passengers and property depend Congress has power to make reasonable regulations and to require the carriers to report in regard thereto, and such regulations are not invalidated by the fact that they relate or apply to railroads and employés engaged in intrastate business.

Helm v. Zarecor	Sub't'd: Oct. 9, 1911 Decided: Nov. 6, 1911 Reported: 222 U. S. 32	Decree of the Circuit Court dismissing the bill reversed.	In determining whether diversity of citizenship exists to give jurisdiction, the Circuit Court should arrange the parties with respect to the actual controversy and their actual position therein as complainants or defendants, looking beyond the formal arrangements made by the bill.
Missouri, etc., Ry. Co. v. Olatho	Sub't'd: Nov. 13, 1911 Decided: Dec. 4, 1911 Reported: 222 U. S. 185	Writ of Error for review of judgment of Kansas Supreme Court dismissed.	Unless the record shows that the judgment sought to be reviewed finally determines the cause, the Supreme Court is without jurisdiction.
Missouri, etc., Ry. Co. v. Olatho (No. 2)	Sub't'd: Nov. 13, 1911 Decided: Dec. 4, 1911 Reported: 222 U. S. 187	Writ of Error for review of judgment of Kansas Supreme Court dismissed.	Where a franchisee refuses to pay the compensation stipulated in the franchise, on the ground that a subsequent ordinance deprived it of a part of what was originally granted, and the State Court finds that the Company had substantially all of the agreed privileges and should pay, there is no question of impairment of the obligation of the contract by the ordinance, and so no Federal question for review.
U. S. v. Citroen	Argued: Nov. 1, 1911 Decided: Feb. 19, 1912	Judgment sustaining ruling of Board of	Provisions of Tariff Act as to classification of pearls will not be pre-

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
	Reported: 223 U. S. 407	General Appraisers, affirmed.	sumed to have been intended to make a radical departure from the policy of former tariff legislation and disregard known facts of the trade.
Ferris v. Frohman	Sub't'd: Nov. 7, 1911 Decided: Feb. 19, 1912 Reported: 223 U. S. 424	Judgment of Illinois Supreme Court affirmed.	The purpose and effect of the copyright law is not to render the fruits of piracy secure; the public performance of a play is not, at common law, an abandonment of it to public use; and a copyright cannot protect one producing a play which is substantially a copy of an unprinted and unpublished play, of which the common-law property right remains in another.
Philadelphia Co. v. Stimson	Argued: Nov. 16, 1911 Decided: Mar. 4, 1912 Reported: 223 U. S. 605	Decree sustaining demurrer to bill of complaint affirmed.	The public right of navigation of a navigable stream follows the stream; the authority of Congress to determine from time to time the harbor lines and what constitutes an obstruction of the public right, goes with it; neither is defeated by the changes in bed and banks made through the years by action of the water, or by efforts of the State to

			confine the public right to the ancient lines.
Tang Tun. v. Edsell	Argued: Nov. 7, 1911 Decided: Mar. 11, 1912 Reported: 223 U. S. 673	Judgment of Circuit Court of Appeals dismissing proceedings to review refusal to admit petitioner to U. S. affirmed.	The decision of U. S. Customs officials as to the citizenship of a Chinese person seeking to enter the U. S., is final, unless reversed on appeal by the Secretary of Commerce and Labor; or unless it affirmatively appears that the executive officers acted unlawfully or improperly, or abused their discretion, their finding is conclusive and not subject to review by the Courts.
Johnson v. Washington L. & T. Co.	Argued: Dec. 8, 1911 Decided: April 1, 1912 Reported: 224 U. S. 224	Decree of Circuit Court for District of Columbia affirmed.	Will construed to give effect to the testamentary intent as to taking *per stirpes*.
Sharpe v. Bonham	Sub't'd: March 12, 1912 Decided April 1, 1912 Reported: 224 U. S. 241	Decree of the United States Circuit Court dismissing the complaint reversed.	Where the controversy is with respect to the control of church property which three trustees hold in trust, the trustees are properly made parties defendant and should not be aligned by the court on the side of the complainant for jurisdictional purposes.
Heckman v. U. S.	Argued: Oct. 13, 1911 Decided: April 1, 1912	Judgment of the Circuit Court of Appeals	The U. S. has capacity to maintain a suit to set aside conveyances made by

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
	Reported: 224 U. S. 413	modified and affirmed; Lurton, J., dissenting, without opinion, on question of jurisdiction.	allottee Indians of allotted lands within the statutory period of restriction, and the suit at bar was well brought.
Mullen v. U. S.	Argued: Oct. 13, 1911 Decided: April 15, 1912 Reported: 224 U. S. 448	Judgment of Circuit Court of Appeals reversed and judgment of Circuit Court sustaining demurrer affirmed.	Where a person whose name appeared on the rolls of the Choctaw Indians died after the ratification of the agreement of distribution, and before receiving the allotment, the land passed at once to his heirs, and the U. S. cannot maintain an action to set aside conveyances made by the heirs within the period of restriction applicable to homestead allotments made to members of the tribe during life.
Goat v. U. S.	Argued: Oct. 13, 1911 Decided: April 29, 1912 Reported: 224 U. S. 458	Judgment of Circuit Court of Appeals modified and affirmed.	The U. S. is entitled to maintain an action to set aside a conveyance made by Seminole Freedmen of homestead lands, of surplus lands made by minor allottees, and by adult allottees if made prior to April 21, 1904, but not conveyances made by adult allottees after April 21, 1904.

Deming Investment Co. v. U. S.	Argued: Oct. 13, 1911 Decided: April 29, 1912 Reported: 224 U. S. 471	Judgment of U. S. Circuit Court of Appeals modified and affirmed.	*Goat* v. *United States* (*supra*) followed, in regard to the validity of conveyances of lands allotted to Seminole Indians and the right of the U. S. to maintain actions to set aside such conveyances.
Phila. Balto. & Wash. R. R. Co. v. Schubert	Argued: April 29, 1912 Decided: May 13, 1912 Reported: 224 U. S. 603	Judgment of Court of Appeals of District of Columbia sustaining verdict for plaintiff for personal injuries affirmed.	Congress has power to make effective the Indemnity Plan covered by the Employers' Liability Act of 1908, by providing that exemptions from liability shall be void, and that the acceptance of benefits under a relief contract, whether existing at the time of the enactment of the statute or not, shall not prevent recovery under the Act.
Graham v. W. Va.	Argued: April 17, 1912 Decided: May 13, 1912 Reported: 224 U. S. 616	Judgment of Supreme Court of Appeals of West Va. sustaining conviction affirmed.	The West Virginia statute providing for heavier penalties for persons convicted of crime, if previously convicted, and for determining the identity of persons formerly convicted in a manner separate from the determination of guilt of a first offence, is constitutional.
Newport Bk. v. Herkimer Bk.	Argued: Feb. 29, 1912 Decided: May 27, 1912 Reported: 225 U. S. 178	Decree of Circuit Court of Appeals dismissing bill to recover	The payment in question was not an illegal preference under the Bankruptcy Act of 1898.

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
		the amounts of an alleged preference affirmed.	
Anderson v. Pac. Coast S. S. Co.	Argued: Feb. 21, 1912 Decided: May 27, 1912 Reported: 225 U. S. 187	Questions certified by the U. S. Circuit Court of Appeals answered in the negative.	State Pilotage laws fall within that class of powers of regulation of commerce which may be exercised by the States until Congress shall act, and the State Pilotage laws of California are applicable to American-registered steam vessels sailing from San Francisco under clearance for final destination in American ports and return, but stopping at foreign ports en route for less than 10 per cent. of the traffic.
David Lupton's Sons v. Auto. Club of Am.	Argued: Dec. 20, 1911 Decided: June 7, 1912 Reported: 225 U. S. 489	Judgment of Circuit Court dismissing complaint reversed and judgment ordered for the plaintiff for the amount fixed by Referee's findings of fact.	New York Court of Appeals having held that Sec. 15 of the General Corporation Laws of New York does not make absolutely void a contract of a foreign corporation which fails to comply with its requirements, but merely disables the corporation from suing thereon in the State Courts, the corporation may maintain its action

			in the Federal Court if jurisdiction otherwise exists.
Savage v. Jones	Argued: Jan. 18, 1912 Decided: June 7, 1912 Reported: 225 U. S. 501	Judgment of the Circuit Court sustaining a demurrer to the bill for want of equity affirmed.	The Indiana statute regulating the sale and requiring disclosure of the formulæ of the ingredients of concentrated commercial food for stock, is within the legislative police power of the State, even though it may incidentally affect interstate commerce.
Standard Stock Food Co. v. Wright	Argued: April 24, 1912 Decided: June 10, 1912 Reported: 225 U. S. 540	Judgment of Circuit Court sustaining a demurrer to a bill to restrain enforcement of the Iowa statute affirmed.	The Iowa Act of 1907, relating to sale of concentrated commercial feeding stuff, is constitutional.
Clairmont v. U. S.	Sub't'd: May 1, 1912 Decided: June 10, 1912 Reported: 225 U. S. 551	Judgment of conviction reversed and the quashing of the indictment directed.	The title to that part of the Flathead Reservation of Montana, within the right of way of the Northern Pacific Railway Co., has been completely withdrawn from the Reservation and is no longer Indian Country within the meaning of the Act of January 30, 1897, in regard to the sale of liquor to Indians and introduction of liquor into Indian country.
Toyota v. Hawaii	Sub't'd: Nov. 13, 1912 Decided: Dec. 2, 1912	Judgment of the Supreme Court of	This Court will assume that the Legislature of a State or Territory, in

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
	Reported: 226 U. S. 184	Hawaii, affirming a conviction for the offence of selling goods at auction without a license affirmed.	making a classification on auction license fees which establishes different amounts for different districts, takes into consideration varying conditions in the respective localities, and the wide range of legislative discretion in classification is not reviewable unless palpably arbitrary.
Purity Extract Co. v. Lynch	Sub't'd: Oct. 28, 1912 Decided: Dec. 2, 1912 Reported: 226 U. S. 192	Judgment of the Mississippi Supreme Court sustaining a defence of illegality of contract affirmed.	A State in the exercise of its police power may prohibit the sale of intoxicating liquors, and, to the end of making the prohibition effective, may include in the prohibition beverages such as Poinsetta, which contain a small percentage of malt, and separately considered might be innocuous.
McNamara v. Henkel	Argued: Dec. 4, 1912 Decided: Jan. 6, 1913 Reported: 226 U. S. 520	Judgment of U. S. District Court dismissing Writ of habeas corpus for review of order of commitment for extradition affirmed.	There was legal evidence upon which the United States Commissioner acted within his discretion in granting the order for extradition.
Grant v. U. S.	Argued: Jan. 6, 1913 Decided: Jan. 20, 1913	Judgment of U. S. District Court adjudg-	Books and documents of a corporation left for safe-keeping with its at-

	Reported: 227 U. S. 74	ing Grant guilty of a contempt affirmed.	torney must be produced by him if they are subpœnaed, notwithstanding his claim of professional privilege and notwithstanding his plea that they would incriminate him.
Fraternal Mystic Circle v. Snyder	Sub't'd: Dec. 16, 1912 Decided: Feb. 24, 1913 Reported: 227 U. S. 497	Judgment of Supreme Court of Tennessee affirming judgment for plaintiff upon a life insurance policy affirmed.	The Tennessee statute, authorizing the imposition upon insurance companies of an additional specified proportionate amount of the policy, where the company has interposed an unsuccessful defence in bad faith, is not unconstitutional and does not impair the obligation of the contract between the insured and the company.
Bacon v. Illinois	Argued: Dec. 6, 1912 Decided: Feb. 24, 1913 Reported: 227 U. S. 504	Judgment of the Supreme Court of Illinois affirming a judgment for the amount of a personal property tax affirmed.	Goods brought from another State, taken from the carrier and held by the owner with full power of disposition, become subject to local taxation, notwithstanding an intent on the part of the owner ultimately to forward the goods to a destination outside the State.
Smoot v. Heyl	Argued: Dec. 16, 1912 Decided: Feb. 24, 1913 Reported: 227 U. S. 518	Judgment of the Court of Appeals of District of Columbia sustaining a decree enjoining the main-	Whether or not a particular wall comes within the District of Columbia rules and definition as to a "party wall" is a question on which the decision of the Court of Appeals

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
		tenance of a wall affirmed.	of the District should be accepted, in the absence of plain error.
Santa Fe Ry. Co. v. Grant Bros.	Argued: Jan. 24, 1913 Decided: April 7, 1913 Reported: 228 U. S. 177	Judgment of Supreme Court of Arizona for plaintiff for loss of property in transit reversed.	The rule that common carriers cannot by contract secure immunity from liability for their own negligence, is inapplicable to a contract made by a carrier for construction work, and a stipulation that the contractor, in consideration of lawfully reduced rates for transportation of supplies and employés, will assume all risk of damage of any kind, if occasioned by the company's own negligence, is not void as against public policy.
George A. Fuller Co. v. McCloskey	Sub't'd: Mar. 7, 1913 Decided: April 7, 1913 Reported: 228 U. S. 194	Judgment of Court of Appeals of the District of Columbia for the plaintiff in an action for personal injuries affirmed.	The contractor was, under the facts of the case, the sole master and responsible for damages sustained by an employé of the sub-contractor resulting from negligence of the elevator operator in failing to respond to signals properly given by such employé.
Minnesota Rate Cases	Argued: April 12, 1912 Decided: June 9, 1913	Judgment of the U. S. Circuit Court enjoin-	Upon appeals involving the validity of certain orders of the Minnesota

	Reported: 230 U. S. 352	ing the enforcement of certain schedules prescribed by the Minnesota R. R. and Warehouse Commission, modified and in part affirmed and in part reversed; McKenna, J., concurring in the result.	Railroad Commission and certain legislative acts of the State of Minnesota prescribing maximum rates for freight and a maximum fare of 2 cents per mile for passengers, such rates relating to traffic exclusively between points within the State—certain rates sustained and certain other rates held confiscatory.
Missouri Rate Cases	Argued: April 3, 1912 Decided: June 16, 1913 Reported: 230 U. S. 474	Decrees of the U. S. Circuit Court enjoining the enforcement of maximum freight rate acts of the Missouri Legislature; affirmed in certain cases and reversed in others.	Legislative acts of the State establishing maximum freight and passenger rates for intrastate commerce will not be declared unconstitutional as confiscatory under the 14th amendment, in the absence of clear and convincing proof as to the value of the property used by the railroad and on which returns are based.
Knott v. St. Louis, S. W. Ry. Co.	Argued: April 3, 1912 Decided: June 16, 1913 Reported: 230 U. S. 509	Appeals and cross-appeals dismissed.	*Missouri Rate Cases* (*supra*) followed.
Knott v. St. Louis, K. C. & Colo. Ry. Co.	Argued: April 3, 1912 Decided: June 16, 1913 Reported: 230 U. S. 512	Decree reversed and dismissal of bill directed.	*Missouri Rate Cases* (*supra*) followed.

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
Chesapeake & O. Ry. Co. v. Conley	Argued: April 8, 1912 Decided: June 16, 1913 Reported: 230 U. S. 513	Writ of Error dismissed and judgment of State Court sustaining acts of West Va. Legislature affirmed.	*Minnesota Rate Cases* (*supra*) followed, and a State statute prescribing rates exclusively for intrastate traffic held within the power of the State to enact.
Oregon R. R. & Nav. Co. v. Campbell	Argued: April 9, 1912 Decided: June 16, 1913 Reported: 230 U. S. 525	Judgment of the Circuit Court sustaining demurrers to bills to restrain enforcement of order of railroad commission of Oregon affirmed.	*Minnesota Rate Cases* (*supra*) followed.
Southern Pac. Co. v. Campbell	Argued: April 9, 1912 Decided: June 16, 1913 Reported: 230 U. S. 537	Decree of U. S. Circuit Court dismissing on demurrer a bill to set aside an order made by the Oregon R. R. commission affirmed.	The Supreme Court should not override the decision of the State tribunal which has been given legislative authority to establish rates of transportation, unless the action of said body is of such an arbitrary character as to constitute an abuse of powers.
Allen v. St. L., Iron Mt. & S. Ry. Co.	Argued: April 15, 1912 Decided: June 16, 1913 Reported: 230 U. S. 553	Decree of U. S. Circuit Court restraining enforcement of an	*Minnesota Rate Cases* (*supra*) followed, and the proof submitted by the carrier held insufficient to justify

		Act of the Arkansas Legislature reversed.	a finding that the rates are confiscatory.
Wood v. Vandalia Ry. Co.	Argued: Dec. 17, 1912 Decided: Oct. 20, 1913 Reported: 231 U. S. 1	Decree enjoining enforcement of an order of Indiana R. R. Commission reversed.	The proofs submitted as to the actual facts in relation to the particular rates complained of held insufficient to warrant a conclusion that the order of the State Railroad Commission was unconstitutional as confiscatory.
Clement National Bk. v. Vermont	Argued: April 29, 1913 Decided: Nov. 10, 1913 Reported: 231 U. S. 120	Judgment of Vermont Supreme Court affirmed.	The Vermont statute imposing a tax on interest bearing deposits in National banks does not deny equal protection of the law by reason of the exemption of non-interest bearing accounts, and is constitutional.
L. & N. R. R. Co. v. Garrett	Argued: April 4, 1912 Decided: Dec. 1, 1913 Reported: 231 U. S. 298	Judgment affirming order of U. S. Circuit Court denying an application for an injunction affirmed.	The Act creating the State R. R. Commission of Kentucky, and the Commission's orders fixing the rates complained of, are constitutional.
Sturges Burn Mfg. Co. v. Beauchamp	Sub't'd: Nov. 3, 1913 Decided: Dec. 1, 1913 Reported: 231 U. S. 320	Judgment of the Illinois Supreme Court sustaining a verdict for the plaintiff affirmed.	The Illinois Child Labor Act of 1903 prohibiting the employment of children under the age of 16 years in various hazardous occupations, and compelling employers, at their peril, to ascertain whether their employés

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
			are in fact below the age specified, is a proper exercise of the protective power of government, and is constitutional.
Eastern Extens. Tel. Co. v. U. S.	Argued: Oct. 22, 1913 Decided: Dec. 1, 1913 Reported: 231 U. S. 326	Judgment of the Court of Claims dismissing petition for want of jurisdiction reversed.	The Court of Claims had jurisdiction to pass upon the claim presented.
Peabody v. U. S.	Argued: Feb. 27, 1913 Decided: Dec. 15, 1913 Reported: 231 U. S. 530	Judgment of Court of Claims dismissing petitions affirmed.	The mere location of a battery the guns of which have not been fired for more than eight years, coupled with the Government's denial of intention to fire, except in case of war, is not an appropriation for military purposes of adjacent land over which the guns would be fired.
Phœnix Ry. Co. v. Landis	Argued: Nov. 12, 1913 Decided: Dec. 22, 1913 Reported: 231 U. S. 578	Judgment of Arizona Supreme Court in favour of the plaintiff affirmed.	The record sustained as valid a verdict and judgment for damages for negligence causing the death of the administrator's intestate.
Hawley v. Malden	Argued: Mar. 7, 1913 Decided: Jan. 5, 1914	Judgment of Massachusetts Supreme Ju-	A State has the right, in creating corporations, to provide for the taxation

	Reported: 232 U. S. 1	dicial Court denying recovery of the tax paid affirmed.	in that State of all the shares of the corporation, whether owned by residents or non-residents.
Adams Express Co. v. N. Y.	Argued: Dec. 4, 1913 Decided: Jan. 5, 1914 Reported: 232 U. S. 14	Decree of the U. S. Circuit Court reversed and entry of decree for complainant directed.	A municipal ordinance requiring the express company to take out a municipal license for transacting interstate business, is unconstitutional, as a burden upon interstate commerce.
U. S. Express Co. v. N. Y.	Argued: Dec. 4, 1913 Decided: Jan. 5, 1914 Reported: 232 U. S. 35	Decree of the U. S. Circuit Court reversed and entry of decree for complainant directed.	*Adams Express Co.* v. *New York* (*supra*) followed.
Taney v. Penn Bank	Argued: Dec. 10, 1913 Decided: Jan. 26, 1914 Reported: 232 U. S. 174	Decree of the U. S. Circuit Court of Appeals sustaining lien affirmed.	The established practice of the distillery business to issue warehouse receipts for whiskey deposited in the warehouse of the distillery and pledge such receipts as security for loans, must be regarded as a usage arising out of the recognised necessities of a lawful business, and is not hostile to public policy.
Rubber Tire Co. v. Goodyear Co.	Argued: May 7, 1913 Decided: Feb. 24, 1914 Reported: 232 U. S. 413	Decree of the U. S. Circuit Court of Appeals reversed and	Plaintiff held not entitled to maintain action for infringement of patent.

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
		order denying injunction directed.	
Seim v. Hurd	Argued: Dec. 17, 1913 Decided: Feb. 24, 1914 Reported: 232 U. S. 420	Certificate dimissed.	None of the questions certified are apposite to the facts of the case as stated in the certificate and the certificate should be dismissed.
Woodward Co. v. Hurd	Argued: Dec. 17, 1913 Decided: Feb. 24, 1914 Reported: 232 U. S. 428	Fourth question certified answered in the negative and other questions left unanswered.	*Seim* v. *Hurd* (*supra*) followed.
Chicago, Mil. & St. P. Ry. Co. v. Minneapolis	Argued: Dec. 19, 1913 Decided: Feb. 24, 1914 Reported: 232 U. S. 430	Judgment of the Minnesota Supreme Court affirmed.	Railroad corporations may be compelled, at their own expense, to build and maintain suitable bridges to carry their tracks over newly laid out highways, and this rule is applicable where the highway or crossing is a canal or waterway connecting other waters within a public park.
U. S. v. Pelican	Argued: Jan. 13, 1914 Decided: Feb. 24, 1914 Reported: 232 U. S. 442	Judgment of the U. S. District Court sustaining demurrer reversed.	A crime committed against an allottee Indian on an Indian allotment within the trust period, is punishable under the laws of the United States

			and the Federal Court has jurisdiction, even though the criminal was not an Indian.
Russell v. Sebastian	Argued: Jan. 6, 1914 Decided: April 6, 1914 Reported: 233 U. S. 195	Judgment of California Supreme Court reversed.	Certain sections of the California Constitution and the municipal ordinances of Los Angeles were ineffectual, under the contract clause of the Federal Constitution, to deprive a corporation which had obtained a franchise, before the amendment of the State Constitution now in force, of its right to continue to lay pipes in the streets of Los Angeles.
Union Lime Co. v. Chic. & N. W. Ry. Co.	Argued: Mar. 2, 1914 Decided: April 6, 1914 Reported: 233 U. S. 211	Judgment of Wisconsin Supreme Court affirmed.	The Wisconsin statute investing railway corporations with power of eminent domain to condemn right of way for spur tracks, is constitutional, even though only one industry was in position to use such spur at the outset.
U. S. v. Birdsall	Argued: Feb. 25, 1914 Decided: April 6, 1914 Reported: 233 U. S. 223	Judgment of U. S. District Court sustaining a demurrer to the indictments reversed.	Sections 39 and 117 of the Criminal Code, defining and punishing the giving and accepting of bribes, cover every action within the range of official duty, whether or not specifically prescribed by statute.

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
Chicago, M. & St. P. Ry. v. Iowa	Argued: Mar. 3, 1914 Decided: April 13, 1914 Reported: 233 U. S. 334	Judgment of Iowa Supreme Court sustaining order of State Railroad Commission affirmed.	The act of the consignee in reshipping an interstate shipment to other points of destination in the cars in which it was received does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same State from having an independent and intrastate character.
Thaddeus Davids Co. v. Davids	Argued: Jan. 22, 1914 Decided: April 27, 1914 Reported: 233 U. S. 461	Judgment of Circuit Court of Appeals reversing decree against infringement of a registered trademark reversed.	A Federal Court has jurisdiction of an action based upon the improper use of a proper-name trademark registered under the 4th proviso of Section 5 of the Trademark Act of 1905.
Bowling v. U. S.	Sub't'd: April 17, 1914 Decided: May 4, 1914 Reported: 233 U. S. 528	Decree of Circuit Court of Appeals setting aside conveyances affirmed.	Restrictions on alienation of Indian lands imposed by Congress are not mere personal restrictions operative on the allottee alone, but run with the land and are binding upon his heirs for the specified term.
Holden Land Co. v. Interstate Tr. Co.	Argued: Feb. 27, 1914 Decided: May 4, 1914 Reported: 233 U. S. 536	Writ of error to review a judgment of the Kansas Supreme Court dismissed;	Where the judgment of the State court is based upon an exercise of equitable jurisdiction in accordance with the jurisprudence of the State,

		White, Ch. J., Holmes, Lamar and Pitney, JJ., concurring; Day, J., writing, and McKenna and Van Devanter, JJ., concurring, in dissent.	the ruling which prescribed the conditions of relief is not reviewable by the Supreme Court.
Atlantic Transp. Co. v. Imbrovek	Argued: Jan. 30, 1914 Decided: May 25, 1914 Reported: 234 U. S. 52	Judgment of Circuit Court of Appeals allowing admiralty recovery for personal injuries affirmed.	As a general principle the test of Admiralty jurisdiction in tort in American courts is locality, and a libellant injured on a ship lying in navigable waters, while he was engaged in loading and stowing of the cargo, may sue in admiralty on the theory that the tort was of a maritime character.
Atlantic Transp. Co. v. Szczesek	Argued: Jan. 30, 1914 Decided: May 25, 1914 Reported: 234 U. S. 63	Judgment of Circuit Court of Appeals allowing admiralty recovery for personal injuries affirmed.	*Atlantic Transport Co.* v. *Imbrovek* (*supra*) followed.
Schmidt v. Bk. of Comm.	Argued: Mar. 19, 1914 Decided: May 25, 1914 Reported: 234 U. S. 64	Judgment of New Mexico Supreme Court reversed.	Under the New Mexico Negotiable Instrument Act the title of a person negotiating a promissory note is defective if any signature thereon has been obtained by fraud, and if proof of fraudulent inducement relieves one

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
			signer from liability all other signers are likewise relieved, even though they did not know about or participate in the fraud.
Atlantic Coast Line v. Georgia	Argued: April 17, 1913 Decided: June 8, 1914 Reported: 234 U. S. 280	Judgment of Georgia Court of Appeals affirming conviction for violating State statute affirmed.	Congress enacting no legislation regulating locomotive headlights, the Georgia statute of 1908, requiring railroad companies to use locomotive headlights of a specified form and power, is a constitutional exercise of the power of the State to secure safety in the physical operation of railroad trains within its territory, even though such trains are used in interstate commerce.
Los Angeles Switching Case	Argued: Jan. 15, 1914 Decided: June 8, 1914 Reported: 234 U. S. 294	Order of Commerce Court restraining the enforcement of an order of the Interstate Commerce Commission reversed and dismissal of the bill directed.	The determination of the Interstate Commerce Commission that carriers should desist from making a switching charge for carload freight, moving in interstate commerce to industrial spur tracks within the switching limits of Los Angeles, was within the discretion of the Commission and the Court cannot substitute its own judgment for that of the Commission.

Interst. Comm. Com. v. So. Ry.	Argued: Jan. 15, 1914 Decided: June 8, 1914 Reported: 234 U. S. 315	Order of Commerce Court restraining the enforcement of an order of the Interstate Commerce Commission reversed and dismissal of the bill directed.	*Los Angeles Switching Case* (*supra*) applied to similar switching charges within the switching limits of San Francisco.
Port Richmond Ferry v. Hudson County	Argued: Mar. 4, 1914 Decided: June 8, 1914 Reported: 234 U. S. 317	Judgment of New Jersey Court of Errors and Appeals sustaining the validity of an Act of the New Jersey Legislature affirmed.	In the absence of Congressional action on the subject a State has the power to establish boundary ferries not a part of a railroad or a continuous interstate transportation system, and regulate the rates to be charged thereon from its shores.
Sault Ste. Marie v. Internat'l Trans. Co.	Argued: Mar. 20, 1914 Decided: June 8, 1914 Reported: 234 U. S. 333	Decree of U. S. District Court restraining enforcement of municipal ordinances affirmed.	A municipal ordinance enacted under State authority, imposing a license fee for the operation of ferries between Sault Ste. Marie and the Canadian shore opposite, is an unconstitutional burden upon interstate commerce, when sought to be applied to a ferry boat operating from the Canadian shore.
Houston & Texas Ry. Co. v. U. S.	Argued: Oct. 29, 1913 Decided: June 8, 1914	Judgment of the Commerce Court dismiss-	The Interstate Commerce Commission has power to order that for the cor-

Title.	*Argued.* *Decided.* *Reported.*	*Action.* *[Unanimous unless otherwise shown]*	*Substance of Holding.*
	Reported: 234 U. S. 342	ing petitions to set aside an order of the Interstate Commerce Commission affirmed; Lurton and Pitney, J.J. dissenting.	rection of discrimination operating against specific localities interstate carriers shall desist from charging higher rates for transportation between enumerated interstate points than between enumerated intrastate points, and so far as the carriers' interstate rates conform to what was found to be reasonable by the Commission, the carriers are entitled to maintain these rates and to comply with the Commission's order by so adjusting the intrastate rates as to remove the forbidden discrimination.
Collins v. Kentucky	Sub't'd: April 22, 1914 Decided: June 22, 1914 Reported: 234 U. S. 634	Judgment of the Kentucky Court of Appeals sustaining a conviction reversed.	A statute which prescribes no standard of conduct that it is possible to know and compels men, on peril of indictment, to guess what their goods would have brought under other conditions not ascertainable, violates the fundamental principle of justice embraced in the conception of due process of law.
Malone v. Kentucky	Sub't'd: April 22, 1914 Decided: June 22, 1914	Judgment of Kentucky Court of Ap-	*Collins* v. *Kentucky* (*supra*) followed.

	Reported: 234 U. S. 639	peals sustaining a conviction reversed.	
St. Benedict Order v. Steinhauser	Argued: Mar. 11, 1914 Decided: June 22, 1914 Reported: 234 U. S. 640	Decree of Circuit Court of Appeals reversed and decree of Circuit Court affirmed.	An agreement between members of a religious order chartered as a society of religious men living in community, who renounced individual rights of property and earnings, reserving a right to withdraw from the community at any time, invades no constitutional right and does not contravene the public policy of the State which chartered the society.
Selig v. Hamilton	Argued: May 6, 1914 Decided: June 22, 1914 Reported: 234 U. S. 652	Judgment of the United States District Court enforcing the liability of a stockholder of an insolvent Minnesota corporation affirmed.	Even a bona fide transfer of his stock does not, under the Minnesota statutes, enable a stockholder to escape liability for previously incurred debts of a Minnesota corporation, and bankruptcy proceedings against the corporation do not bar resort to the statutory method of enforcing the stockholder's liability.
U. S. v. Mayer	Argued: Oct. 23, 1914 Decided: Nov. 16, 1914 Reported: 235 U. S. 55	Questions certified by the Circuit Court of Appeals answered.	After a writ of error has been issued to review a judgment of conviction in the District Court in a criminal case, that court has no jurisdiction, after the close of the term at which the

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
			conviction was had, to set aside the judgment and order a new trial on facts outside the record and discovered only after the term had ended.
McCabe v. A. T. & S. F. Ry. Co.	Argued: Oct. 26, 1914 Decided: Nov. 30, 1914 Reported: 235 U. S. 151	Decree of the Circuit Court of Appeals dismissing the bill to enjoin compliance with the Oklahoma Separate Coach Law affirmed; White, Ch. J., and Holmes, Lamar and McReynolds, JJ., concurring in the result.	The 14th amendment to the Constitution is not violated by State legislation requiring separate but equal accommodations for the white and African races; but the rule of equality is violated by an Act permitting carriers to provide sleeping cars, dining cars and chair cars for the exclusive use of white passengers and none for the use of passengers of the African race.
Louisiana Ry. & Nav. Co. v. New Orleans	Argued: Nov. 5, 1914 Decided: Nov. 30, 1914 Reported: 235 U. S. 164	Judgment of Louisiana Supreme Court affirmed.	The obligation of a contract based on a former ordinance is not impaired by the ordinance now complained of relative to the construction of a belt line railroad in New Orleans, where it appears that the contract was subject to a suspensive condition and that the event in which the obligation was to arise did not happen.

N. Y. Elec. Lines Co. v. Empire City Subway Co.	Argued: Nov. 6, 1914 Decided: Nov. 30, 1914 Reported: 235 U. S. 179	Judgment of the New York Court of Appeals sustaining denial of an application for a writ of peremptory mandamus affirmed.	Rights become vested under a municipal franchise when the same have been exercised as well as granted; where there has been a non-user for an unreasonable time, revocation by a municipal authority does not contravene the "impairment of obligation" clause of the Federal Constitution.
Shapiro v. U. S.	Argued: Dec. 4, 1914 Decided: Dec. 14, 1914 Reported: 235 U. S. 412	Writ of error for review of conviction in U. S. District Court dismissed.	The Supreme Court is not authorised to review a judgment or decree of the Circuit Court of Appeals otherwise than by a writ of error or other proceedings directed to that Court.
Wathen v. Jackson Oil Co.	Sub't'd: Nov. 9, 1914 Decided: Jan. 11, 1915 Reported: 235 U. S. 635	Order of U. S. District Court denying application for a preliminary injunction affirmed.	Until a stockholder of a corporation can clearly show that he has exhausted the means within his reach to obtain action by the corporation to restrain the enforcement of a statute which he regards an an unconstitutional deprivation of the property rights of the corporation, he may not himself maintain the action.
Reynolds v. Fewell	Argued: Dec. 8, 1914 Decided: Jan. 18, 1915 Reported: 236 U. S. 58	Judgment of Oklahoma Supreme Court affirmed.	Although this court has an undoubted right of review of the construction which the Supreme Court of Oklahoma has placed upon a tribal law, it

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
			will not overturn, in a case at most debatable, a legal rule of construction which for years has governed transfers of property.
Shellenbarger v. Fewell	Argued: Dec. 8, 1914 Decided: Jan. 18, 1915 Reported: 236 U. S. 68	Judgment of Oklahoma Supreme Court affirmed.	*Reynolds* v. *Fewell* (*supra*) followed.
Wilmington Transp. Co. v. Cal. R. R. Com.	Argued: Dec. 16, 1914 Decided: Feb. 1, 1915 Reported: 236 U. S. 151	Judgment of the California Supreme Court, sustaining the authority of State Railroad Commission, affirmed.	In the absence of action by Congress, a State may, through proper orders of its Railroad Commission, prevent exorbitant charges for ferry transportation, if both origin and termination are within the State and none of such transportation is within any other State, although the voyage is over a stretch of open sea.
Miller v. Wilson	Argued: Jan. 12, 1915 Decided: Feb. 23, 1915 Reported: 236 U. S. 373	Judgment of California Supreme Court affirming conviction for violation of the State statute affirmed.	The California statute of 1911, preventing the employment of women in enumerated occupations, including hotel work, for more than eight hours a day or a maximum of forty-eight hours a week, does not overstep the limit of the reasonable exertion of the protective authority of the State and

			does not prescribe an arbitrary basis of classification.
Bosley v. McLaughlin	Argued: Jan. 12, 1915 Decided: Feb. 23, 1915 Reported: 236 U. S. 385	Decrees of U. S. District Court dismissing application for injunction affirmed.	*Miller* v. *Wilson* (*supra*) followed, and the exemption of graduate nurses from the operation of the statute held to be a matter for legislative rather than judicial control.
Wright Blodgett Co. v. U. S.	Argued: Jan. 27, 1915 Decided: Feb. 23, 1915 Reported: 236 U. S. 397	Judgment of the Circuit Court of Appeals affirmed.	*Bona fide* purchase for value of a homestead patent obtained through fraud is a defence which must be affirmatively established, in order to defeat the cancellation of the patent.
315 U. S. v. Smull	Argued: Jan. 7, 1915 Decided: Feb. 23, 1915 Reported: 236 U. S. 405	Judgment of the U. S. District Court sustaining a demurrer to an indictment for perjury reversed.	Knowingly swearing falsely to an affidavit required either expressly by statute or by an authorised regulation or long-standing and customary procedure of the Land Department, will sustain an indictment for perjury.
Northern Pa. Ry. Co. v. N. Dak.	Argued: Oct. 20, 1914 Decided: Mar. 8, 1915 Reported: 236 U. S. 585	Judgment of North Dakota Supreme Court directing carriers to put rates into effect reversed; Pitney, J., dissenting without opinion.	The North Dakota Legislature exceeded its authority in enacting a statute which prescribed maximum intrastate rates on coal in carload lots so low as to require the carrier to transport the commodity for less than the cost of transportation or virtually at cost.

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
Norfolk & W. Ry. v. W. Va.	Argued: Oct. 13, 1914 Decided: Mar. 8, 1915 Reported: 236 U. S. 605	Judgment of West Virginia Circuit Court reversed.	The 2 cents a mile passenger rate established by the West Virginia Legislature afforded a very narrow, if any, margin over the cost of the traffic, and is in excess of the power of the State.
U. S. v. Hvoslef	Argued: Jan. 13, 1915 Decided: Mar. 22, 1915 Reported: 237 U. S. 1	Judgment of U. S. District Court awarding recovery for stamp taxes paid upon certain charter parties affirmed.	A tax on a charter party on a vessel exclusively for foreign ports is in substance a tax on exportation, and, as such, is a tax on exports, invalid under Sec. 9, Art. I, of the Federal Constitution.
Thames v. Mersey Ins. Co.	Argued: Jan. 13, 1915 Decided: April 5, 1915 Reported: 237 U. S. 19	Judgment of U. S. District Court sustaining a demurrer in an action to recover amounts paid as stamp taxes upon policies of marine insurance on exports reversed.	*United States* v. *Hvoslef* (*supra*) followed and applied to taxes on policies of marine insurance on exports.
U. S. v. Noble	Argued: Mar. 2, 1915 Decided: April 5, 1915 Reported: 237 U. S. 74	Decree of Circuit Court of Appeals reversed.	Certain Indian leases held unauthorised and void.

Robinson v. B. & O. R. R. Co.	Argued: Mar. 4, 1915 Decided: April 5, 1915 Reported: 237 U. S. 84	Judgment of Court of Appeals of District of Columbia affirmed.	A contract between the Pullman Company as employer and its employé, releasing the Pullman Company and also all railroad corporations over whose lines the Pullman Company's cars were operated, from claims for liability for personal injuries sustained by the employé, is valid.
Louisville & N. R. R. Co. v. Maxwell	Sub't'd: Mar. 8, 1915 Decided: April 5, 1915 Reported: 237 U. S. 94	Judgment of Tennessee Supreme Court for the defendant in action to recover an alleged undercharge on the sale of railroad tickets reversed; McReynolds, J., dissenting without opinion.	Under the Interstate Commerce Act, the rate shown in the duly filed tariffs must be charged by the carrier and paid by the shipper or passenger without departure therefrom.
Rounds v. Cloverport Foundry	Sub't'd: Feb. 23, 1915 Decided: April 19, 1915 Reported: 237 U. S. 303	Judgment of Kentucky Court of Appeals affirmed.	The jurisdiction of the Kentucky court to enforce statutory liens for repairs on vessels upheld.
Minn. & St. P. Ry. Co. v. Popplar	Sub't'd: April 14, 1915 Decided: April 26, 1915 Reported: 237 U. S. 369	Judgment of Minnesota Supreme Court affirmed.	The record on which was obtained a verdict for the plaintiff under the Federal Safety Appliance Act, shows no ground for reversal.
Spokane I. R. R. Co. v. Whitley	Argued: Mar. 18, 1915 Decided: May 17, 1915	Judgment of Idaho Supreme Court sus-	The mother of the deceased held entitled to maintain an action in Idaho

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
	Reported: 237 U. S. 487	taining a verdict for the plaintiff affirmed.	under the statute of that State giving a remedy for wrongful death.
Virginia v. West Virginia	Argued: April 29, 1915 Decided: June 14, 1915 Reported: 238 U. S. 202	Decree entered in pursuance of opinion.	The final adjustment between the States of Virginia and West Virginia and the determination of the equitable portion of the debt of Virginia which West Virginia should assume and the liability of the latter for interest thereon stated in detail.
Price v. Illinois	Argued: May 12, 1915 Decided: June 21, 1915 Reported: 238 U. S. 446	Judgment of Illinois Supreme Court sustaining conviction under the State Pure Food Law affirmed.	In the avowed exercise of its power to impose restrictions, if reasonable, with relation to health protection, the Illinois Legislature had power to enact a prohibition against the sale of such specific articles as it deemed injurious, e. g., a "canning preservative" containing boric acid.
Pennsylvania R. R. Co. v. Clark Coal Co.	Argued: May 14, 1915 Decided: June 21, 1915 Reported: 238 U. S. 456	Judgment of the Pennsylvania Supreme Court sustaining verdict for treble damages against a carrier reversed.	Where the Interstate Commerce Act has been found to have been violated and a ruling to this effect has been made by the Commission, the shipper must elect between a proceeding for reparation before the Commission or a suit in the Federal Courts, and may

			not maintain an action in the State Court.
Mills v. Lehigh V. R. R. Co.	Argued: May 11, 1915 Decided: June 21, 1915 Reported: 238 U. S. 473	Judgment of the U. S. Circuit Court of Appeals reversed; judgment of the District Court modified by striking out the allowance of attorney's fee, and affirmed as modified.	In a suit for reparation, a report of the Interstate Commerce Commission finding that the rate complained of was unreasonable and that a specified amount should be awarded for reparation, is *prima facie* evidence of the damage sustained, although the evidentiary or primary facts before the Commission are not set forth.
Truax v. Raich	Argued: Oct. 15, 1915 Decided: Nov. 1, 1915 Reported: 239 U. S. 33	Order of U. S. District Court granting an injunction affirmed; McReynolds, J., dissenting in memorandum.	A suit against officers of a State, who are about to proceed wrongfully to injure the complainant by enforcing an unconstitutional statute requiring that employers employ only a specified percentage of alien employés, is not a suit against the State, within the meaning of the 11th Amendment.
Southern Ry. Co. v. Campbell	Argued: Nov. 4, 1915 Decided: Nov. 15, 1915 Reported: 239 U. S. 99	Judgment of the South Carolina Supreme Court affirmed.	The reasonableness of the carrier's rule relative to forefeiture of mileage books is a question for the Interstate Commerce Commission; the applicability of the rule to the state of facts at bar is the only question

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
			for this court in an action to recover damages for the wrongful forfeiture of the plaintiff's mileage book.
Providence Saving Ass'n v. Kentucky	Argued: Oct. 21, 1915 Decided: Nov. 15, 1915 Reported: 239 U. S. 103	Judgment of Kentucky Court of Appeals sustaining imposition of tax reversed.	The State has not the power to treat the mere continuance of the obligation of existing insurance policies held by resident policy holders as the transaction of a local business, justifying the imposition of an annual privilege tax, in the absence of the actual conduct of business within the limits of the State.
O'Neill v. Leamer	Argued: Oct. 26, 1915 Decided: Nov. 29, 1915 Reported: 239 U. S. 244	Judgment of Nebraska Supreme Court affirmed.	The Nebraska statutes of 1905 and 1909, relative to the establishment of drainage districts and the proceedings had thereunder, are not unconstitutional.
Houck v. Little R. Drainage Dist.	Argued: Oct. 28, 1915 Decided: Nov. 29, 1915 Reported: 239 U. S. 254	Judgment of Missouri Supreme Court affirmed.	Unless the exaction is a flagrant abuse of power, a State may, in its discretion, lay assessments for public work, in proportion, either to position, drainage area, market value or estimated benefits.

Christianson v. King County	Argued: Nov. 10, 1915 Decided: Dec. 13, 1915 Reported: 239 U. S. 356	Judgment of Circuit Court of Appeals affirmed.	Under the law of the Territory of Washington, the property involved in this case escheated to the county in which it was situated.
Chicago & A. R. R. Co. v. Wagner	Sub't'd: Nov. 29, 1915 Decided: Dec. 20, 1915 Reported: 239 U. S. 452	Judgment of Illinois Supreme Court sustaining a verdict for the plaintiff affirmed.	A State Court denies no Federal right in holding that where one of two tort feasors is the employer and obtains from an employé who was injured in interstate commerce a release invalid under the Employers' Liability Act, such release is also invalid against the other joint tort feasor.
Seven Cases v. U. S.	Argued: Dec. 2, 1915 Decided: Jan. 10, 1916 Reported: 239 U. S. 510	Judgments of condemnation under the Food and Drugs Act affirmed.	The Sherley amendment of 1912 to the Food and Drugs Act, defining "mis-branding" to include any "false and fraudulent" statements on the package or label "regarding the curative or therapeutic effect of such article," is constitutional.
Commercial Bk. v. Canal Bk.	Argued: Dec. 8, 1915 Decided: Jan. 10, 1916 Reported: 239 U. S. 520	Decree of Circuit Court of Appeals reversed and decree in favour of appellant directed.	Provisions of the Uniform Warehouse Receipts Act of Louisiana construed and appplied.
U. S. v. Ross	Argued: Dec. 10, 1915 Decided: Jan. 10, 1916	Judgment of Court of Claims reversed.	In the absence of clear abuse of necessary official discretion this Court

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
	Reported: 239 U. S. 530		will not overrule the judgment of the War Department as to whether the nature of the work of an enlisted man, detailed to perform duties in connection with the work of maintaining a telephone and telegraph office in a military hospital, entitles him to extra duty pay.
N. Y. & N. R. R. Co. v. Peninsula Exch.	Argued: Dec. 16, 1915 Decided: Jan. 24, 1916 Reported: 240 U. S. 34	Judgment of Maryland Court of Appeals in favor of the shipper affirmed.	The Carmack Amendment of 1906 enables recovery from the initial carrier for loss, damage or injury from failure to transport with reasonable despatch, even though the delay takes place on the lines of the connecting carrier.
Illinois Cent. R. R. Co. v. Skaggs	Argued: Jan. 20, 1916 Decided: Jan. 31, 1916 Reported: 240 U. S. 66	Judgment of Minnesota Supreme Court sustaining a verdict for the plaintiff under the Federal Employers Liability Act affirmed.	The defendant is not entitled to complain of any minor verbal mistakes made in the charge of the trial Court, where his counsel failed to call attention to the same at the time.
Rogers v. Hennepin County	Argued: Dec. 6, 1915 Decided: Feb. 21, 1916	Judgment of Minnesota Supreme Court	Memberships in an incorporated grain exchange as property of the indi-

	Reported: 240 U. S. 184	refusing to restrain the collection of certain taxes affirmed; McReynolds, J., being of opinion that the writ of error should have been dismissed.	vidual members are distinct from the assets of the exchange itself, and taxing the members on their memberships and the exchange corporation on its assets does not amount to a double taxation or violate the broad discretion of the State as to classification and exemptions.
U. S. v. Morrison	Argued: Dec. 15, 1916 Decided: Feb. 21, 1916 Reported: 240 U. S. 193	Decree of Circuit Court of Appeals reversing decree in favour of the U. S. reversed and decree of District Court affirmed.	Provisions of Federal statutes relative to land sections 16 and 36 in the State of Oregon construed and applied.
Illinois Surety Co. v. Peeler	Argued: Jan. 14, 1916 Decided: Feb. 21, 1916 Reported: 240 U. S. 214	Judgment of Circuit Court of Appeals modified and affirmed.	The Material Men's Acts of 1894 and 1905 construed and applied to the rights of subcontractors thereunder.
Kansas C. Ry. Co. v. Kansas	Sub't'd: Jan. 7, 1916 Decided: Feb. 21, 1916 Reported: 240 U. S. 227	Judgment of Kansas Supreme Court denying recovery of taxes paid affirmed.	The Kansas statute of 1913, imposing certain annual taxes on domestic corporations, is constitutional, even though the corporation is engaged in interstate commerce.
Lusk v. Kansas	Sub't'd: Jan. 7, 1916 Decided: Feb. 21, 1916	Judgment of Kansas Supreme Court deny-	The Kansas statute of 1913, taxing foreign corporations doing business

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
	Reported: 240 U. S. 236	ing recovery of taxes paid affirmed.	in Kansas for such privilege upon the proportion of its stock used within the State, is constitutional.
Carey v. Donohue	Argued: Jan. 17, 1916 Decided: Mar. 13, 1916 Reported: 240 U. S. 430	Decree of Circuit Court of Appeals reversed.	Section 60 of the Bankruptcy Act construed and applied, in determining the validity of a judgment setting aside transfers made more than four months before the petition in involuntary bankruptcy was filed.
Great Northern Ry. v. Knapp	Argued: Feb. 24, 1916 Decided: Mar. 20, 1916 Reported: 240 U. S. 464	Judgment of Minnesota Supreme Court sustaining a verdict for the plaintiff under the Employers' Liability Act affirmed.	The verdict and judgment for the plaintiff in the action at bar for personal injuries under the Federal Employers' Liability Act, present no questions of an exceptional character and the Court confines itself to the mere announcement of its conclusion of affirmance.
Farnham v. U. S.	Argued: Mar. 2, 1916 Decided: April 3, 1916 Reported: 240 U. S. 537	Judgment of Court of Claims adverse to the plaintiff modified and affirmed.	The facts do not sustain the pending claim against the United States for infringement of patent rights in connection with postage stamp holders.
Jones Nat'l Bk. v. Yates	Argued: Jan. 13, 1916 Decided: April 3, 1916 Reported: 240 U. S. 541	Judgment of Nebraska Supreme Court reversed and rein-	The judgments of the United States District Court in the action brought by the plaintiffs as unpaid depositors

		statement of judgment entered in the District Court directed.	against directors of the defendant's bank to recover damages attributed to false representation of the bank's condition, are sustained by the facts and the applicable provisions of statute.
Southern Ry. Co. v. Prescott	Argued: Feb. 23, 1916 Decided: April 10, 1916 Reported: 240 U. S. 632	Judgment of South Carolina Supreme Court sustaining a verdict for the plaintiff reversed.	The obligation of the defendant as an interstate carrier and warehouseman of consigned goods after their arrival at destination was not governed by the State law.
Osborne v. Gray	Argued: April 3, 1916 Decided: April 17, 1916 Reported: 241 U. S. 16	Judgment of Tennessee Supreme Court sustaining a verdict for the plaintiff affirmed.	The Court will not take judicial notice that the cars in which the deceased was injured came from without the State and were therefore engaged in interstate commerce at the time of the injury.
The Raithmoor	Argued: Jan. 26, 1916 Decided: May 1, 1916 Reported: 241 U. S. 166	Decree of the U. S. District Court dismissing the libel reversed, and the cause remanded.	Admiralty has jurisdiction of a libel *in rem* against a ship for the damage caused by its collision with an incompleted beacon, located in navigable waters and designed for use solely as a governmental aid to navigation.
Chicago, B. & Q. R. R. Co. v. Harrington	Sub't'd: April 17, 1916 Decided: May 1, 1916 Reported: 241 U. S. 177	Judgment of Kansas City Court of Appeals sustaining a verdict	Regardless of whether an injured employé had previously been, or in the immediate future was to be, engaged

Title.	*Argued. Decided. Reported.*	*Action. [Unanimous unless otherwise shown]*	*Substance of Holding.*
		for the plaintiff affirmed.	in interstate commerce, the Federal Employers' Liability Act does not apply unless he was engaged in interstate commerce at the time he was injured.
Georgia, Fla. & Ala. Ry. Co. v. Blish Co.	Argued: Mar. 15, 1916 Decided: May 8, 1916 Reported: 241 U. S. 190	Judgment of Georgia Court of Appeals sustaining a verdict for the plaintiff affirmed.	The Carmack Amendment of Section 20 of the Hepburn bill casts upon the initial carrier responsibility with respect to the entire transportation and enables judgment against the initial carrier for misdelivery by the connecting carrier.
U. S. v. Coca Cola Co.	Argued: Feb. 29, 1916 Decided: May 22, 1916 Reported: 241 U. S. 265	Judgment of Circuit Court of Appeals in favour of the Coca Cola Co. reversed.	Under the Food and Drugs Act of 1906, there is a misbranding if the article sold under a name made by uniting several names descriptive of the article does not contain any of the articles generally known individually by any of such names, and the question whether "an added ingredient" such as caffeine is poisonous or deleterious is a question for the jury, even though such ingredient is covered by the formula and is made a constituent of the article sold.

Russo-Chinese Bk. v. Nat'l Bk. of Comm.	Argued: April 14, 1916 Decided: June 5, 1916 Reported: 241 U. S. 403	Judgment of Circuit Court of Appeals sustaining verdict for the defendant affirmed.	Questions relating to a transaction between two banks regarding drafts and documents annexed thereto determined.
St. Louis Land Co. v. Kansas City	Argued: Mar. 7, 1916 Decided: June 5, 1916 Reported: 241 U. S. 419	Judgment of Missouri Supreme Court sustaining assessments affirmed.	The Seventh amendment is not applicable to an assessment or condemnation proceeding in a State court.
Levindale Lead Co. v. Coleman	Argued: April 25, 1916 Decided: June 5, 1916 Reported: 241 U. S. 432	Judgment of Oklahoma Supreme Court annulling a conveyance of Indian lands reversed.	The Osage Indian Allotment Act of 1906 placed no restriction upon the alienation of land, or undivided interests in land, of which white men who were not members of the tribe became owners.
New York v. Becker	Argued: Decided: June 12, 1916 Reported: 241 U. S.	Judgment of New York Court of Appeals affirmed. This opinion by direction of the Court had been prepared by Hughes, J., and was approved before his resignation. After that event it was again considered, readopted and delivered by White, Ch. J.	The clause of a grant reserving to the Indian grantors and their heirs the privilege of fishing and hunting on the tract of land conveyed does not reserve tribal rights paramount to the inherent sovereign power of the State to enforce regulations for the preservation of fish and game within its borders.

APPENDIX "B"

TABLE OF DISSENTS BY JUSTICE HUGHES FROM THE MAJORITY OPINION

Title.	*Argued. Decided. Reported.*	*Action.*	*Majority and Minority View.*
Thompson v. Thompson	Argued: Oct. 27, 1910 Decided: Dec. 12, 1910 Reported: 218 U. S. 611	Judgment of Court of Appeals for the District of Columbia affirmed; Day, J., writing, and White, Ch. J., and McKenna and Lurton, JJ., concurring; Harlan, J., writing, and Holmes and Hughes, JJ., concurring, in dissent.	Majority view that under existing statutes a wife cannot maintain an action in the District of Columbia against her husband to recover damages for an assault and battery by him upon her person. Minority view that the Courts should not concern themselves with the expediency of giving the wife such a right of action, but should declare the law as it has been established by competent legislative authority. Existing statutes are held clearly to give the wife the right to sue for injuries by an assault, and the clearly expressed will of the legislature should not be defeated by a construction of its words that cannot be reconciled with their ordinary meaning.
Memphis v. Cumberland Tel. Co.	Argued: Nov. 9, 1910 Decided: Dec. 12, 1910	Direct appeal from judgment of the Cir-	Majority view that where the Circuit Court enjoined enforcement of

Reported: 218 U. S. 624

cuit Court of the U. S. dismissed for want of jurisdiction; Day, J., writing, and Harlan, Holmes and Lurton, JJ., concurring; White, Ch. J., writing, and McKenna and Hughes, JJ., concurring, in dissent.

municipal ordinances regulating the complainant's telephone rates and the bill alleged that the ordinances were unauthorised and illegal, and were discriminatory, unequal and confiscatory, etc., and the opinion of the Circuit Court stated that the result of the ordinances was "destructive of the complainant's rights under the Federal Constitution," the allegations of the bill must be construed as referring to the State Constitution and as creating no basis for jurisdiction of the Supreme Court to review on direct appeal the adverse determination below. Minority view that the opinion of the Court below is a part of the record, as well as the complainant's bill, and may be examined to see if a reviewable issue was decided below; and that where the Court below has enjoined a municipal regulation by deciding a question of Federal right adversely to the municipality, the Supreme Court has jurisdiction and duty to review and correct the error committed by the Court below, whether such error arose from a wrong decision of the Federal question (i. e.

Title.	*Argued. Decided. Reported.*	*Action.*	*Majority and Minority View.*
			of constitutionality under the Federal Constitution) actually passed upon or from a mistake in assuming that the Federal question was before it for decision.
Oklahoma v. Kansas Nat. Gas Co.	Argued: April 5, 1911 Decided: May 15, 1911 Reported: 221 U. S. 229	Decree adverse to State statute affirmed; McKenna, J., writing, and White, Ch. J., and Harlan, Day, Van Devanter and Lamar, JJ., concurring; Holmes, Lurton and Hughes, JJ., concur in dissent without memorandum.	Majority view that the Oklahoma statute prohibiting foreign corporations from building pipe lines across highways and transporting natural gas therein to points outside the State is unconstitutional. Minority dissent without opinion.
U. S. v. Johnson	Argued: April 13, 1911 Decided: May 29, 1911 Reported: 221 U. S. 488	Judgment quashing indictment affirmed; Holmes, J., writing, and White, Ch. J., and McKenna, Lurton, Van Devanter and Lamar, JJ., concurring; Hughes, J.,	Majority view that the term "misbranding," in the penal provisions of the Food and Drugs Act, relates to false statements as to *identity* of the article (e. g. strength, quality, purity), and not at statements as to curative effects, even though misleading. Minority view that the statute

		writing, and Harlan and Day, JJ., concurring, in dissent.	applies likewise to false statements *of fact* as to curative qualities and "mis-branding" in this respect.
Carpenter v. Winn	Argued: April 21, 1911 Decided: May 29, 1911 Reported: 221 U. S. 533	Judgment of the United States Circuit Court and Circuit Court of Appeals reversed; Lurton, J., writing, and all of the members of the Court concurring, except Hughes, J., who dissented without memorandum.	Majority view that Section 724 of the Revised Statutes empowers a court of law to compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection by his adversary.
Interstate Comm. Com. v. Diffenbaugh	Argued: Oct. 18, 1911 Decided: Nov. 13, 1911 Reported: 222 U. S. 42	Decree of Circuit Court granting injunctions against orders of the Commission slightly modified and affirmed; Holmes, J., writing, and White, Ch. J., and Lurton, Van Devanter, and Lamar, JJ., concurring; McKenna, J., writing, and Hughes, J., concurring, in dissent.	Majority view that payments by railroads, under contracts, to owners of elevators at trans-shipment points, of elevation charges not exceeding those fixed by the Commission as reasonable, do not become illegal discriminations or rebates when paid to such owners on their own grain. Minority view that the practice accomplishes a result transcending the statute and is illegal.

Title.	*Argued. Decided. Reported.*	*Action.*	*Majority and Minority View.*
Henry v. A. B. Dick Co.	Argued: Oct. 27, 1911 Decided: Mar. 11, 1912 Reported: 224 U. S. 1	Question certified answered in affirmative; Lurton, J., writing, and McKenna, Holmes and Van Devanter, JJ., concurring; White, Ch. J., writing, and Hughes and Lamar, JJ., concurring in dissent.	Majority view that where a complainant in selling his patented machine, attached a license restriction that it be used only in connection with specified unpatented articles also made by the complainant, and then with knowledge of such license agreement and with expectation it would be used in connection with the patented machine, the defendant sold to a vendee of the machine an unpatented article of the class specified in the license restriction, an act of contributory infringement of the complainant's patent is shown. Minority view that the majority ruling will destroy, in a large measure, the judicial authority of the States, by unwarrantedly extending the Federal judicial power, and will, as to patented articles, result in the indefinite multiplication of accessory monopolies, contrary to public policy as to unpatented articles and under general rules of law.

Gromer v. Standard Dredging Co.	Sub't'd: Feb. 28, 1911 Decided: April 22, 1912 Reported: 224 U. S. 362	Judgment of District Court of Porto Rico reversed; McKenna, J., writing, and White, Ch. J., and Holmes, Lurton, Van Devanter, JJ., concurring; Day, J., writing, and Hughes and Lamar, JJ., concurring, in dissent.	Majority view that there is nothing in the record to show that the property taxed had not acquired a *situs* in Porto Rico, even though being used there by a Government contractor domiciled in Delaware. Minority view that the decision of the Court below that the property had not acquired a *situs* in Porto Rico was correct and was sufficient to sustain the judgment.
Hyde v. U. S.	Argued: May 3, 1912 Decided: June 10, 1912 Reported: 225 U. S. 347	Judgment of Court of Appeals of the District of Columbia affirming a conviction for conspiracy, affirmed; McKenna, J., writing, and White, Ch. J., Day, Van Devanter and Pitney, JJ., concurring; Holmes, J., writing, and Lurton, Hughes and Lamar, JJ., concurring, in dissent.	Majority view that overt acts performed in the District of Columbia by one of the parties who had conspired in another District, in violation of Section 5440 of the Revised Statutes, gives jurisdiction as to all of the conspirators to the Courts of the District of Columbia. Minority view that no jurisdiction exists for their trial in the District of Columbia.
Evans v. U. S.	Argued: Dec. 5, 1912 Decided: Jan. 6, 1913 Reported: 226 U. S. 567	Judgment of United States Court of Claims dismissing the claim	Majority view that where one already holding a government position is appointed as a special disbursing

Title.	*Argued. Decided. Reported.*	*Action.*	*Majority and Minority View.*
		of a departmental employee for extra compensation for additional services affirmed; Pitney, J., writing, and all of the members of the Court concurring, except McKenna and Hughes, JJ., who dissented without memorandum.	agent, such appointment is not a designation to a separate and distinct office from that already held by him, but merely an order requiring him to perform additional services.
334 Grand Trunk, West. Ry. Co. v. South Bend	Argued: Dec. 11, 1912 Decided: Feb. 24, 1913 Reported: 227 U. S. 544	Judgment of Supreme Court of Indiana sustaining a demurrer reversed and the case remanded; Lamar, J., writing, and White, Ch. J., and McKenna, Holmes, Lurton, Van Devanter and Lamar, JJ., concurring; Day, J., concurring in result; Hughes and Pitney, JJ., dissent without memorandum.	Majority view that where a municipal ordinance has permitted a railway company to lay double tracks through one of its streets and this has been done as to a part of the distance, this was a valid exercise of delegated legislative power, and in the absence of a reservation of power to repeal or alter, a subsequent ordinance repealing the franchise to the extent of withdrawing the right to maintain the second track, was an impairment of the contract, unconstitutional, and not a valid exercise of the police power.

Kansas Southern Ry. Co. v. Carl	Argued: Oct. 22, 1912 Decided: March 10, 1913 Reported: 227 U. S. 639	Judgment of Arkansas Supreme Court sustaining judgment for full value of goods reversed; Lurton, J., writing, and all of the members of the Court concurring, except Hughes and Pitney, JJ., who dissented without memorandum.	Majority view that the shipping contract under which a lower rate was obtained in consideration of the statement of a limited value, does not, upon its face, offend against the provisions of the Carmack Amendment.
Donnelly v. U. S.	Argued: Dec. 18, 1912 Decided: April 7, 1913 Reported: 228 U. S. 243	Judgment of the United States Circuit Court convicting a white man for murder of an Indian within the Hoopa Valley Reservation affirmed; Pitney, J., writing, and White, Ch. J., and McKenna, Day, Van Devanter and Lamar, JJ., concurring; Holmes, J., writing, and Lurton and Hughes, JJ., concurring, in dissent.	Majority view that the trial court properly excluded hearsay evidence of the confession of a third party, out of court, tending to exonerate the accused by admitting the guilt of the third party of the crime with which the accused is charged. Minority view that the confession should have been admitted.

Title.	*Argued. Decided. Reported.*	*Action.*	*Majority and Minority View.*
McCoach v. Minehill Ry. Co.	Argued: Jan. 15, 1913 Decided: April 7, 1913 Reported: 228 U. S. 295	Judgment of Circuit Court of Appeals for recovery of taxes illegally assessed under the Corporation Tax Act of 1909 affirmed; Pitney, J., writing, and White, Ch. J., and McKenna, Holmes, Lurton and Van Devanter, JJ., concurring; Day, J., writing and Hughes and Lamar, JJ., concurring, in dissent.	Majority view that a railway corporation which has leased its lands to another company for operation, but which continues its corporate existence and collects and distributes to stockholders the rental from the lines and dividends from investments, is not doing business within the meaning of the Corporation Tax Act. Minority view that the company is a corporation doing business within the meaning of the Act.
Slocum v. N. Y. Life Ins. Co.	Argued: April 26, 1912 Decided: April 21, 1913 Reported: 228 U. S. 364	Judgment of the Circuit Court of Appeals reversing judgment for the plaintiff modified by eliminating the direction to enter judgment for the defendant and by substituting a direction for a new trial; Van Devanter, J., writing,	Majority view that although under the practice of the State court a judgment may be entered by the Appellate Court upon the evidence, notwithstanding the verdict which the Appellate Court has determined to reverse, the Federal Court has not and cannot have this power under the Seventh Amendment of the Constitution, but must order a new trial where the evidence does not sustain

		and White, Ch. J., McKenna, Day and Lamar concurring; Hughes, J., writing, and Holmes, Lurton and Pitney, JJ., concurring, in dissent.	the verdict. Minority view that Circuit Court of Appeals was right in reversing the judgment, but that it had the power to enter judgment for the defendant upon the record, without granting a new trial.
Owensboro v. Cumberl. Tel. Co.	Argued: April 22, 1913 Decided: June 16, 1913 Reported: 230 U. S. 58	Decree of U. S. Circuit Court permanently enjoining the repealing of municipal ordinances, affirmed; Lurton, J., writing, and White, Ch. J., and Holmes, Van Devanter and Lamar, concurring; Day, J., writing and McKenna, Hughes and Pitney, JJ., concurring, in dissent.	Majority view that a reservation of right to alter or amend a municipal ordinance granting a public utility corporation franchise rights in the street is not a clear and explicit reservation of a right to revoke or repeal the ordinance itself, but amounts only to a reservation of police control incidental to the unabridged police power. Minority view that the ordinance did not grant, and the City Council could not have granted, an irrepealable franchise, and where, in the face of this charter provision and presumably with knowledge of it, the company entered the streets, this grant is subject to this superior right and the subsequent repealing ordinance was within the power of the municipality.

Title.	*Argued. Decided. Reported.*	*Action.*	*Majority and Minority View.*
Union Pac. R. R. Co. v. Laramie Stock-yds. Co.	Sub't'd: Oct. 14, 1913 Decided: Dec. 1, 1913 Reported: 231 U. S. 190	Judgment of United States District Court reversed and sustaining of demurrer to the answer directed; McKenna, J., writing, and White, Ch. J., and Day, Van Devanter, and Lamar, JJ., concurring; Holmes, Lurton and Pitney, JJ., taking no part in the decision; Hughes, J., dissenting without memorandum.	Majority view that this Court will not assume that Congress intended by subsequent act to forfeit or limit any of the rights granted to the trans-continental railroads unless its intention is explicitly and effectively shown.
Union Pac. R. R. Co. v. Snow	Sub't'd: Oct. 14, 1913 Decided: Dec. 1, 1913 Reported: 231 U. S. 204	Judgment of Colorado Supreme Court reversed; McKenna, J., writing, and White, Ch. J., and Day, Lurton, Van Devanter and Lamar, JJ., concurring; Holmes and Pitney, JJ., taking no part in the decision; Hughes, J., dissenting without memorandum.	Majority view that the ruling in *Union Pacific R. R. Co.* v. *Laramie Stockyards Co.* (*supra*) operates against declaration of a forfeiture of the railroad rights under consideration.

Union Pac. R. R. Co. v. Sides	Sub't'd: Oct. 14, 1913 Decided: Dec. 1, 1913 Reported: 231 U. S. 213	Judgment of Colorado Supreme Court reversed; McKenna, J., writing, and White, Ch. J., and Day, Lurton, Van Devanter and Lamar, JJ., concurring; Holmes and Pitney, JJ., taking no part in the decision; Hughes, J., dissenting without memorandum.	*Union Pacific R. R. Co.* v. *Snow* (*supra*) followed by the majority.
N. Y. Life Ins. Co. v. Deer Lodge County	Argued: Nov. 11, 1913 Decided: Dec. 15, 1913 Reported: 231 U. S. 495	Judgment of the Montana Supreme Court sustaining the imposition of a tax affirmed; McKenna, J., writing, and White, Ch. J., and Holmes, Day, Lurton, Lamar and Pitney, JJ., concurring; Hughes and Van Devanter, JJ., dissenting without memorandum.	Majority view that a Montana statute imposing a tax on insurance corporations doing business within the State, and measuring such tax according to the excess of premiums received over losses and expenses incurred within the State, is not a burden upon interstate commerce or otherwise unconstitutional.
Norfolk & W. Ry. Co. v. Holbrook	Argued: Dec. 2, 1914 Decided: Jan. 5, 1915 Reported: 235 U. S. 625	Judgment of the Circuit Court of Appeals affirming a verdict for	Majority view that the charge of the trial court gave the jury occasion for indefinite speculation and therefore

Title.	*Argued. Decided. Reported.*	*Action.*	*Majority and Minority View.*
		the plaintiff in an action under the Employers' Liability Act reversed; Reynolds, J., writing, and White, Ch. J., and Holmes, Van Devanter, Lamar and Pitney, JJ., concurring; McKenna, J., writing, and Day and Hughes, JJ., concurring, in dissent.	comparison of the rights of the actual beneficiaries with those of supposed dependents. Minority view that the charge in the court was based upon the realities of life and violated no essential of a fair trial.
340 Ariz. & N. Mex. Ry. Co. v. Clark	Argued: Dec. 1, 1914 Decided: Jan. 11, 1915 Reported: 235 U. S. 669	Judgment of the Circuit Court of Appeals sustaining a verdict for the plaintiff under the Employers' Liability Act affirmed; Pitney, J., writing, and White, Ch. J., and McKenna, Holmes, Van Devanter, Lamar, Pitney and McReynolds, JJ., concurring; Hughes, J., writing, and Day, J.,	Majority view that where the plaintiff has voluntarily testified with respect to his injuries and has introduced other evidence as to his injuries, but has not testified with reference to communications made by him to the physician, the evidence of the physician as to the facts ascertained upon a personal examination of the plaintiff was, under the Arizona statute, properly excluded. Minority view that it cannot be deemed to have been a legislative intent to give the plaintiff a monopoly

			concurring, in dissent.	of testimony as to his condition while under treatment and to permit him, while fully disclosing his physical disorders, to claim a privilege in order to protect himself from being contradicted by his physician as to the same matter.
Coppage	v. Kansas	Sub't'd: Oct. 30, 1914 Decided: Jan. 25, 1915 Reported: 236 U. S. 1	Judgment of Kansas Supreme Court sustaining a conviction under State statute reversed; Pitney, J., writing, and White, Ch. J., and McKenna, Van Devanter, Lamar, Pitney and McReynolds, JJ., concurring; Holmes, J., dissenting in memorandum and Day, J., dissenting in memorandum in which Hughes, J., concurred.	Majority view that the due process clause of the Fourteenth Amendment is contravened by the Kansas statute making it a misdemeanor for an employer to require an employé to agree not to join or become or remain a member of any labour organisation during the time of employment, in so far as it is sought to apply the statute to requiring an employé, a man of full age and understanding, to choose without constraint or coercion whether he would give up his employment or would agree to refrain from membership in the union while employed. Minority view of Holmes, J., that there is nothing in the Constitution of the United States to prevent legislation of this character. Minority view of Day and Hughes, JJ., that the stipulation forbidden by the

Title.	*Argued. Decided. Reported.*	*Action.*	*Majority and Minority View.*
			statute is essentially coercive in character and the statute did not go beyond a legitimate exercise of the police power in placing limitations upon the sacrifice of rights which one man can exact from another as a condition of employment.
Wright v. Central of Ga. Ry. Co.	Argued: Jan. 29, 1915 Decided: March 22, 1915 Reported: 236 U. S. 675	Decree of U. S. District Court granting an injunction against taxation of the plaintiff affirmed; Holmes, J., writing, and White, Ch. J., and McKenna, Day, Van Devanter, JJ., concurring; Lamar, J., taking no part in the decision; Hughes, J., writing, and Pitney, J., concurring, in dissent; McReynolds, J., also dissenting.	Majority view that taxes based on ownership of railroad property built under special charters containing irrepealable contracts by which the property was not subject to be taxed higher than a specified per cent. on the annual income therefrom, cannot, under the Georgia statutes and the leases involved in this case, be enforced in an *ad valorem* form against a lessee of the property. Minority view that the tax here sought to be collected does not violate the Constitution of the United States.
Frank v. Mangum	Argued: Feb. 26, 1915 Decided: April 12, 1915	Order of U. S. District Court refusing	Majority view that Leo M. Frank is not shown to have been deprived

	Reported: 237 U. S. 309	writ of *habeas corpus* affirmed; Pitney, J., writing and White, Ch. J., and McKenna, Day, Van Devanter, Lamar and McReynolds, JJ., concurring; Holmes, J., writing, and Hughes, J., concurring, in dissent.	of any right guaranteed to him by the Fourteenth Amendment or other provision of laws of the United States, but has been convicted and is now held in custody under "due process of law." Minority view that the Federal Court should have taken jurisdiction on *habeas corpus* and proceeded to try the facts as to whether the accused had a fair trial, in fact free from outside influence and control.
Cumberland Mfg. Co. v. DeWitt & Co.	Argued: Mar. 10, 1915 Decided: May 10, 1915 Reported: 237 U. S. 447	Judgment of Maryland Court of Appeals affirmed; Day, J., writing, and McKenna, Holmes, Van Devanter and Pitney, JJ., concurring; White, Ch. J., writing, and Hughes, Lamar and McReynolds, JJ., dissenting.	Certain provisions of the Bankruptcy Act in regard to set-off of mutual claims of the bankrupt and his creditors construed and applied, with majority and minority views.
Georgia v. Tenn. Copper Co.	Argued: April 7, 1915 Decided: May 10, 1915 Reported: 237 U. S. 474	Entry of a final decree against the Ducktown Sulphur, Copper & Iron Co. directed; McReynolds, J., writ-	Majority view that a final decree should be entered restraining the Ducktown Company from operating its plant, except upon the terms as to the emission of fumes from smelt-

Title.	*Argued. Decided. Reported.*	*Action.*	*Majority and Minority View.*
		ing, and McKenna, Day, Van Devanter, Lamar and Pitney, JJ., concurring; Hughes, J., writing, and White, Ch. J., and Holmes, J., concurring, in dissent.	ing ore, etc., specified therein. Minority view that the evidence does not justify a decree limiting production as stated.
Reese v. Phila. & Reading Ry. Co.	Argued: Dec. 1, 1915 Decided: Dec. 20, 1915 Reported: 239 U. S. 463	Judgment of United States Circuit Court of Appeals sustaining a judgment of non-suit affirmed; McReynolds, J., writing, and White, Ch. J., and McKenna, Holmes, Day, Van Devanter and Lamar, JJ., concurring; Hughes and Pitney, JJ., dissenting.	Majority view that in this action under the Employers' Liability Act, the trial court did not err in entering a non-suit. Minority view that upon the question of the defendant's negligence there was sufficient evidence to go to the jury.
Illinois Cent. R. R. Co. v. Messina.	Argued: Feb. 23, 1916 Decided: Mar. 6, 1916 Reported: 240 U. S. 395	Judgment of Mississippi Supreme Court sustaining verdict for the plaintiff reversed; Holmes, J., writing, and White, Ch. J.,	Majority view that the anti-pass provision of the Hepburn Act of 1916 operates to bar a recovery for personal injuries suffered by plaintiff while riding upon the tender by permission of the engineer and without

		Van Devanter, Lamar, Pitney and McReynolds, JJ., concurring; Hughes, J., writing, and McKenna, J., concurring, in dissent.	payment of fare. Minority view that the provisions of the Hepburn Act were not applicable to this case.
U. S. v. Jin Fuey Moy	Argued: Dec. 7, 1915 Decided: June 5, 1916 Reported: 241 U. S. 394	Judgment of the United States District Court quashing an indictment on the ground that the statute did not apply to the case, affirmed; Holmes, J., writing, and White, Ch. J., and McKenna, Day, Van Devanter and McReynolds, JJ., concurring; Hughes and Pitney, JJ., dissenting without memorandum.	Majority view that while the Opium Registration Act of December 17, 1914, may have moral as well as revenue-producing purposes in view, this Court will, in view of the grave doubts as to its constitutionality except as a revenue measure, construe and apply it as such.

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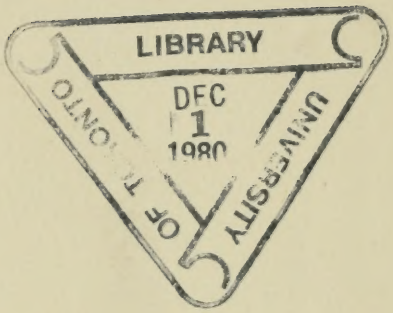
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